TABLE OF CITED AUTHORITIES *Page*

Studies Finds Brain Grows New Cells, by Gina Kolata, published NY Times March 17, 1998, at F1 3

Tribe, Laurence H. , Intergovernmental Immunities in Litigation, Taxation & Regulation: Separation of Powers Issues in Contoversies About Federalsim, 89 Harvard Law Review, 682, 684 (1976) 29

Supreme Court Practice, Stern, Gressman, Shapiro & Geller, 8th Edition 2002.....29 -30

Random House Websters Unabridged DictionarySecond Edition (2001) 11-13

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CITATION OF THE REPORTS OF OPINIONS IN THIS CASE

On October 25, 2004, two rulings were issued by the hearing judge. The first is an order wherein the motion to set aside the default was denied. [*App. at 3a* hereinafter referred to as order] The second was a decision recommending petitioner's disbarment. [*App. at 5a* – hereinafter referred to as decision] The review department denied the appeal of the order on December 3, 2004. [*App. 4a*] The petition to review the order was denied on January 26, 2005. [*App. 1a* – Cal Rules of Court ¶ 952(c)]

The appeal of the decision to the review department was denied on January 5, 2005. [*App. 21a(a)*] A petition to review the decision was denied on April 27, 2005. [*Appendix at page 2a* – hereinafter referred to as App.]

BASIS FOR JURISDICTION

On April 27, 2005, the final decision of the State's highest court was rendered. [Cal. Rules of Court ¶ 952(a) - at *App. 2a*] This petition is timely and brought pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fourteenth and Eleventh Amendments together with Articles ¶ VI & ¶ IV of the Constitution are attached. [*App. 50a-51a*] In addition, ¶ 42 U.S.C. ¶ 12131-12133 & ¶ 12102 (2) (B) of Title II of the ADA, coupled with ¶ 6049.1 of the California Business and Professions Code and ¶ 300 (L) of the Rules of Procedure of the State Bar of California, are set forth in the accompanying appendix. [see *App.51a-55a*]

STATEMENT OF THE CASE

(i): *Type of qualified disability at bar. The import of both the neurologist and neuropsychologist testimony that was offered by petitioner and rejected by the States.*

The human brain and its ability to reason is what separates man from all other species. Petitioner was and remains to be a victim of a very serious head injury sustained on January 1, 1984. This resulted in permanent scars to the "areas of cortical and white matter encephalomalacia in the *right frontal and left posterior temporal* parietal regions." [see page 4 to petitioner's brief to California Supreme Court filed March 2, 2005 – hereinafter petitioners brief; see medical opinion of Dr. Luciano dated September 22, 2004 at *App. 22a-25a*] [1]

It is the left temporal lobe that is the core to high level of intelligence. It effects both language and emotional traits. Each are handled separately both in the process of information and its recovery. It is crucial to understand that the recovery process of the brain is not to be looked

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[1] The documented hospital and medical records of petitioner is a "record of such impairment" and as such, a qualified disability. [see 42 U.S.C. ¶ 12102 [2] [B]]. "Head injury" and "neurological disorders (including stroke and epilepsy)" is a "significant disability" as defined by 29 U.S.C. ¶ 705 (21)(a)(iii). [see Point I[a][i] at page 10 below] This results in both physical and emotional impairments and is thus a disability under 42 U.S.C. ¶ 12102 (2) (A). The "remedies and procedures" provided under ¶ 794a(a)(2) [a.k.a. Rehabilitation Act ¶ 505] was recognized to govern discrimination under Title II. [*see Tennessee* v *Lane*, 541 U.S. 509, at 517; 124 S. Ct. 1978; 158 L.Ed. 2d 820; 72 U.S.L.W. 4273 (2004) citing 42 U.S.C. ¶ 12133 and affirming 315 F. 3d 680 (CA6) (2003) - hereinafter referred to as *Lane*]

upon in unison. The process by which information is communicated varies when the patient is healthy. The same holds to be accurate when the brain is attempting to recover after being injured. Respecting the process of repair, Dr. Luciano upon his review of the prior opinions of Dr. Gordon [October 2002; November 2003] set forth as follows:

> The left temporal lobe is a crucial region of the brain as it is involved in language, memory and emotion. These functions are separate and distinct as far as recovery is concerned. In my professional career I have cared for perhaps 30 patients I can recall whose emotional recovery took longer than that of their cognitive abilities. This would be due to differential degrees of damage in various portions of the temporal lobe. [see opinion dated February 18, 2005 at *App. 32a-33a* ; also see Point IV [B] pages 22-25 and Point I [A][ii] [a] pages 11-13].

It is the recovery process of petitioner's brain that is a major issue in the present case. The heart of the recent neurological findings is that regeneration of new brain cells is the core to its "repair". What is of crucial to note is that this can occur in adults. These findings have changed all prior notions in this field. [see Adult Brain Cells Said To Reproduce, by Holcomb B. Noble, published NY Times October 30, 1998, Front Page at *App.40a-45a*] [2]

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[2] also see (i): Studies Finds Brain Grows New Cells, by Gina Kolata, published NY Times March 17, 1998, at F1.
(ii): Brain May Grow New Cells Daily, by Nicholos Wade, Published NY Times, October 15, 1999, front page;.
(iii): Research Dispels Myth That Brain In Adults Is Unable to Renew Itself, by Lawrence Altman, published NY Times, April 18, 1995, at C3 and,

Petitioner respectfully makes clear that he is unaware of how his brain has made its recovery. But one thing is for certain. Recognizing the magnitude of the neurological injury can only be understood after the injured person has reacquired the skills. One does not fully comprehend the extent of the damage beforehand.

At bar, the neuropsychologist (Dr. Parker) would have to look at the medical records of petitioner. Thereafter, he would be compelled to consult with a doctor who specializes in head trauma and whose particular expertise are seizures. At issue are the intricacies of how the left temporal lobe effects a persons demeanor. An investigation without this information would be obsolete.

Furthermore, the expert would require to investigate the patient on an objective basis. An expert cannot be compelled to view petitioner as a pathological liar. Yet this is precisely the process for which the State of California set forth on the face of the notice of the charges that they filed on or about January 30, 2004. [see *App. at 7a-8a, et. al* re: B & P ¶ "6049.1 (a) at *App. 53a-55a* – "shall be" " conclusive"] This is far different than having the experts on both sides submit separate objective opinions to the Court thus allowing the judiciary to come to a proper factual conclusion. [see and cf. i.e. Point III page 21 ft. note 12 below citing i.e. *Hason* v *Department of Health*, 295 A.D. 2d 818, 821 (3d Dep't) (2002)]

In the present matter, each of the experts have "specialized knowledge" that they can *communicate* to the court which "would assist the trier of fact to understand the

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(iv): Humanity Maybe its in the Wiring: [re: *Conduits of Emotion*], by Sandra Blakeslee, published NY Times, December 9, 2003 at F1.

evidence or to determine a fact in issue." [*Daubert* v *Merrell Dow*, 509 U.S. 579, 589 (1993)] [see Point IV [B] pages 22-25 & Point I [A][ii] [a] pages 11-13] [3]

> **(ii)**: *Each of the excuses for excluding neurological testimony are refuted by expert in the field. State Court's reducing the record of sister state improper. Endorsement of sister state's finding in vacuum violates Title II and deprives petitioner of due process.*

The sister state referee's reason for excluding the timely offered expert testimony was that there was no "prior relationship" between petitioner and Dr. Parker. [see referees report dated August 25, 2001, at page 15 attached as exhibit "A" to verified answer] This concept was totally ignored by the Appellate Division. [*In re Stevens*, 294 A.D. 2d, 1-10 (2002)] The remaining reason for exclusion was that petitioner recovered from the neurological injury as of 1985. Each of these rationales were specifically refuted by Dr. Parker. [see opinions attached at *App. 34a-39a* – See point IV [B] pages 22-25 below]

The State Bar and Court were informed of the discrepancy between the referee and Appellate Division on eight separate occasions. [see petitioner's brief dated March 2, 2005, at Point II [A] page 17; see brief to Review

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[3] It was at all times pointed out to the State Bar of California that petitioner did timely request to introduce Dr. Parker as his expert and that petitioner was willing to pay for the costs. [see petitioners letter of January 2, 2004 to Trial Counsel of State of California, (hereinafter referred to as State Bar) attached as Exhibit "B" to answer of February 24, 2004 citing 28 C.F.R. Ch. 35.130 (b) (7)]

Department filed November 17, 2004 regarding motion to set aside default at pages 14-17]

Therefore, it is important to note that the State Bar set forth that "these prior decisions were not available to us". [see Transcript to August 3, 2004 default hearing at page 7 line 22-24 re: referees decision]. [4]

The hearing judge then found that the Appellate Division's decision would be reviewed "in and of itself". [see TR. Page 6 lines 17-19] She modified the underlying sister state record by finding that "the final decision sometimes summarizes and just references earlier findings." [see TR at page 6 line 23-24]

This proposition is not entirely consistent with the sister state's rulings. The Appellate Division did not summarize the referees "no prior relationship" reasoning for excluding the expert testimony. By ignoring this, the sole basis that is now on the record for purposes of such exclusion is that petitioner was healthy as of 1985. [*In re Stevens, id,* at 6] Even if one were to revive the "no prior relationship" basis for exclusion, this too is fatally incorrect.[see Point IV [B] pages 22-25 below] [5]

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[4] The State Bar was served this decision on three separate occasions. [(**a**): December 14, 2003 memo to State Bar; (**b**): verified answer (**c**): application for stay to review department dated August 2, 2004]

[5] The State Bar further reduced the record of the sister state when they deleted the transcript to the underlying hearing. This was after petitioner was notified that this was *certified* and would be submitted as evidence. [see Deputy Trial Counsel's correspondence dated July 14, 2004, at Appendix C to petitioners brief filed March 2, 2005; see Cal. Business and

Regardless, the *outright exclusion* of the experts testimony taints the sister state proceeding. [*Lane*, at 531 et. al] This especially is in light of *Lane*, the statutory language of Title II, and the history thereof as set forth by this Court in its decision rendered on May 17, 2004. [see Points I-VII below] To continue the policy of exclusion, whether it be under the principle of a full recovery in 1985, and/or, the "no prior relationship" concept, violates Title II of the ADA and deprives petitioner of an opportunity to be heard. It further fuels, and/or, is a subtle *endorsement* of the exclusionary policy of the State of New York. This is precisely what Congress and this Court sought to prevent under Title II of the ADA. [see *Tennessee* v *Lane, supra*, at Point I [A][ii] [a & b] at pages 10-17 below]

(iii): *Ignoring expert neurologist whose specialty is in the field of epilepsy is highly prejudicial. Denial of motion to set aside default judgment raises deprivation of the right to be heard. [Point II [B] pg.19 below]*

The scheduled hearing date of August 3, 2004 was agreed to 4 months beforehand. [see Point II [A] at page 17 below]

On June 5th and July 16, 2004, petitioner sustained two distinct seizures. The medical ramifications are well known to neurologists and understood by petitioner. The most important time period to control the side effects are the first 30 days therefrom. [see Dr. Luciano's medical

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Professions Code, ¶ 6049.1(d); hereinafter referred to as B & P; see *App 7a*]. At that NY hearing, there were over 100 pages of testimony with respect to petitioner's neurological disability. Petitioner had relied on its entry.

reports dated September 22nd and November 4, 2004 at *App. 22a-31a*]

The State Bar and its judiciary ignored this. They claim that petitioner falsely contrived the seizures. [see entire opposition brief filed January 3, 2005, to California Supreme Court re: order of October 25, 2004] The hearing judge claimed that the "first time" petitioner "argued" his medical condition was in the motion to set aside the default. [filed September 27, 2004 at *App. 3a*] This is not entirely accurate.

The record establishes that petitioner informed the State Bar and Review Department immediately after they had denied the motion to dismiss on August 16, 2004. [*infra* Point II[A] page 18 ft. note 11] It was the Review Department that refused to entertain the motion to reconsider. [cf. re: Rules of Procedure of the State Bar of California ¶ 300 (L) at 55a-56a]. They insisted that petitioner must first return to the hearing judge and pursue a motion to set aside the default. [see ¶ 201 (c) of Rules of Procedure of the State Bar of California; & motion to set aside was timely filed -- see *App. 4a cf. 3a*]

To impose a default judgment is the equivalent to resignation. Petitioner made clear that this would not be considered. [see ¶ 8 to motion to dismiss filed July 1, 2004 citing *Alexander* v *Margolis,* 921 F. Supp. 482, 487 affirmed 98 F. 3d 1341 (CA6) (1996) further prior objections omitted]

To forever impair petitioner's entrance into any courtroom, in any case, with his credibility being impeached is unwarranted. It negatively effects proper access to the courtroom. To have the hearing judge further label

petitioner's failure to appear as a form of ill will, and/or, an *aggravating* factor, is tantamount to "flagrant injustice." [see *Appendix at 17a-18a;* see *Ex Parte Bradley*, 7 Wall, 364, 379 (1868)]

This court has made clear from the turn of the 19th century that it does have subject matter jurisdiction, and/or, supervisory power over disciplinary proceedings when the court has failed to provide an opportunity to be heard, and/or, has "clearly exceeded its power" . [*Ex Parte Bradley, supra*, at 378 distinguishing *Ex Parte Burr*, 9 Wheat, 529, 530; 6 L.Ed. 152 (1824); and see i.e. *Frazier* v *Heebe*, 482 U.S. 641, at 645-646 (1987), quoting *In re Ruffalo,* 390 U.S. 544, 554 (1968) (White J. concurring) also *In re Snyder,* 472 U.S. 634, 643 (1985*); Theard* v *United States*, 354 U.S. 278, 282 (1957)]

Petitioner respectfully maintains that upon "[re]view" of the "entire record" the "permanent disbarment" by the respective States is *"unnecessarily severe."* [*emphasis added see Sacher v Association of the Bar of the City of New York*, 347 U.S. 388, 389 (1954)]

REASONS FOR GRANTING THE WRIT

Point I [A] [i]:

Petitioner's qualified disability is acknowledged by Congress.

A head injury leads to "physical or mental impairment that substantially limits one or more of the major life activities." [42 U.S.C. ¶ 12102 [A]]. The "definition" of "'disability'" is: "[A] a physical or mental impairment.... [B] a record of such impairment." The documented medical and hospital records respecting petitioner from 1984-2004 is self explanatory. [42 U.S.C. ¶ 12102 (2) A–C; also see 29 U.S.C. ¶ 705 (20) (B) (i) (ii) & (iii)] Further statutes passed by Congress regarding relevant definitions of disabilities are set forth on page 2 ft. note 1 above and incorporated herein by this reference. [6]

Point I [A] [ii]:

The statutory language to Title II makes clear that it applies to various types of qualified disabilities. The range of time and scope is revealed by its history. As a result of this Court's decision in Lane, a higher

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[6] With this in mind, "epilepsy" has been found to be a qualified disability in prior cases raised under the ADA. [i.e. *Susie* v *Apple Tree Preschool and Child Car Center*, 866 F. Supp., 390, 395 (N.D. Iowa) (1994) failed to provide proper accommodation for absences due to epilepsy]. By way of comparison, "bipolar disorders", and/or, "bipolar affective disorder" are not within scope of 29 U.S.C. ¶ 705(21)(a)(iii), nor were they found to be under Title I or II. [Title I - *Fitzgerald* v *Dept. of Defense*, 85 M.S.P.R. 463, 468-470 (2000) & Title II - *Hason* v *Depart. of Health*, 295 A.D. 2d 818, 819 (Third Dep't) (2002)]

standard of review exists for qualified citizens with disabilities. This falls under the scope of ¶ 1 of the Fourteenth Amendment.

(a): *Statutory language supports the inclusion of numerous forms of qualified disabilities. Expert testimony to be communicated to Court on behalf of petitioner is within scope of Title II.*

Title II unequivocally applies to both "architectural" or "*communication*" "barriers". [emphasis added 42 U.S.C. ¶ 12131[2]] A neurological expert's opinion must be communicated to the judiciary. This would include the "imparting or interchange of thoughts, opinion, or information by speech, writing, or signs." [Random House Websters Dictionary, Second Edition, (2001)]. This right can only take place after a party enters a courthouse.

In the present case expert testimony would include "the transfer of information from one cell to another, as by chemical or electrical signals." [Random House Websters Dictionary, *supra*; also see Dr. Luciano's medical opinions dated November 4, 2004 at *App. 26a-31a at 30a* and February 18, 2005 *App.at 33a*]

The process for which information is transcribed is through *electrolytes*. What is of import to the present case is that the brain divides this process into different units. Therefore, emotional, language, [7] physical, and analytical

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[7] Approximately 50,000 years ago there was an evolution of the human's mind that is directly related to language skills. [see Language Gene is Traced to Emergence of Humans, by Nicholos Wade, published NY Times August 15, 2002 at page 18 thereof and at *App. 46-49a* herein]

traits are separately transmitted in its communicative status. They are further repaired by way of this divisional method as well. [see expert neurological opinions of Dr. Luciano at *App. 32a –33a*; *& App. 26a-31a at 30a*]

The State Bar's argument that there is not one word in Title II that applies to anything other than architectural defects is inaccurate. [see State Bar's opposition papers to petitioner's motion to dismiss dated July 9, 2004, and its opposition brief filed on March 21, 2005]

The intent of Congress in its passage of Title II makes certain that the judicial arm of the state courthouse is not restricted to protect one form of disability. Nor is it limited to incidents that take place before the citizen enters the courtroom itself. The legislature uses the word "or" on eight (8) separate occasions in 42 U.S.C. ¶ 12131[2] & 42 U.S.C. ¶ 12132. "Or" as far as "logic" is concerned with is "the connective used in disjunction." Disjunction is the "serving or tending to disjoin; *separating*; dividing; *distinguishing*; a statement, course of action, etc., *involving alternatives*." [emphasis added, Random House Websters, *supra*, (2001)] Therefore, the definition of "qualified disability" is not limited. The State must provide

> "reasonable modifications, to rules, policies, *or* practices, the removal of architectural, communication, *or* transportation barriers, *or* the provision of auxiliary aides and services."
> [emphasis added 42 U.S.C. ¶ 12131(2)]

The "opportunity to be heard" is a constitutional right governed by the 14th Amendment that is to be "provided by a public entity." [42 U.S.C. ¶ 12131 [2]]

A violation takes place when, as here, the state judiciary *excludes* the disabled citizen from its *participation* by disallowing the party the right to *communicate* his defense through an expert on the subject. [42 U.S.C. ¶ 12132] To ignore the expert neurological opinion on the danger and medical impediment for petitioner to appear at the hearing of August 3, 2004, [Dr. Luciano at *App. 26a-31a*] and to adopt the outright exclusion of expert testimony by the sister state, cannot plausibly be considered to be a "reasonable modification" of any kind. [cf. 42 U.S.C. ¶ 12131[2]; i.e. Dr. Parker *App.* at *32a-39a*] [8]

POINT I [A] [ii] (b):

History of Title II fully supports that the arm of the State that Congress was most concerned with was the judiciary.

Congress passed Title II after learning " that individuals in many States across the country, were *being excluded from courthouses and court proceedings* by reason of their disability." [emphasis added *Lane, supra* at 527] [9]

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[8] The right to "communicate" clearly applies to disabled citizens who are the hearing or visually impaired. This is set forth under 42 U.S.C. 12102 (1) (A-D). This can only takes place after they are already in the Courthouse. The limited perspective of the State Bar as far as Title II is concerned with is respectfully not on point. [also see Point I [A] [ii] [b] page 16 ft. note 10 below]

[9] The State Bar Court is an "administrative arm" of the California Supreme Court. [*In Re Rose*, 22 Cal. 4th 430 at 438 (2000)] It is the California Supreme Court that has "original jurisdiction".[see *Koningsberg* v *State Bar of California*, 353 U.S. 252, 254 (1957) "original jurisdiction"]

The discrimination that this Court set forth took place both in and outside the courthouse. The individuals were and were not parties to ongoing litigation.

The examples that this Court set forth were: (**a**): the outright "exclusion" of citizens with disabilities to take part in the judicial process as a "juror" [emphasis added, i.e. *Lane*, 541 U.S. 509, 524 –526 ft. notes 9 & 14] or (**b**): as a litigant who has a "hearing impairment", or is "blind" [*Lane, id.* 526. note 14] or (**c**): is a victim of "paraplegia" who is in the midst of litigation [*Lane* plaintiff] (**d**): or is an independent contractor, whose livelihood as a court-reporter is deprived in the courthouse itself. [Jones – plaintiff see *Lane*, 541 U.S. 509, at 514 and at 543 ft. note. 4 Rehnquist Ch. J. dissenting].

In addition, discrimination to the (**e**): mentally challenged was recognized. [see i.e. *Lane*, at 525 citing *Youngberg* v *Romeo*, 457 U.S. 307 (1982); also see *Lane*, at 534 concurring opinion, Souter J. and Ginsburg J. citing i.e. *Buck* v *Bell*, 274 U.S. 200, 205 (1927) *"feeble minded"*]

In finding that Congress did have the requisite authority to pass Title II under ¶ 5 of the Fourteenth Amendment this Court linked it to the principles of due process. As the Court found:

> Ct: "Due Process Clause requires the States to afford certain civil litigants a '" *meaningful opportunity to be heard*"' by removing obstacles to their *full participation in judicial proceedings*." [emphasis added *Lane, supra* 541 U.S. 509, 523, quoting *Boddie* v *Connecticut*, 401 U.S. 371, 379 (1971) *M.L.B.* v *S.L.J.*, 519 U.S. 102 (1996)]

This Court made clear that when court's are brought into the picture, a "more searching judicial review" is warranted. [emphasis added, *Lane, supra* at 522-523 citing *Dunn* v *Blumstein*; *Shaprio* v *Thompson*; and *Skinner* v *Oklahoma infra*].

It thereby raised the standard of review to a "*heightened 14th Amendment scrutiny*." [emphasis added, *Lane*, *supra*, 541 U.S. 509 at 550, dissenting opinion Rehnquist Ch. J. citing and acknowledging Court's reliance upon *Dunn* v *Blumstein*, 405 U.S. 330, 336-337 (1972) (voting); *Shapiro* v *Thompson*, 394 U.S. 618, 634 (1969) (right to move to new jurisdiction); *Skinner* v *Oklahoma* ex. *Rel. Williamson,* 316 U.S. 535, 541 (1942) (marriage & procreation)].

The import of the judiciary to dissuade discrimination was set forth in the concurring opinion of Justices Souter and Ginsburg.

> Ct: The evidence to be considered would underscore the appropriateness of action under ¶ 5 to address the situation of disabled individuals before the Courts for that evidence would show that the *judiciary* itself *has endorsed* the basis for the very discrimination subject to congressional remedy under section 5. [emphasis added *Lane*, *supra*. 541 U.S. 509; 534 citing i.e. *Buck* v *Bell*, *supra*]

Further, the area in which all questions of constitutional rights and deprivations are resolved in is the

judiciary itself. This was acknowledged by the dissenting opinion of Chief Justice Rehnquist.

> Ct: "'A violation of *due process occurs only* when a person is actually denied the constitutional right to access a *given judicial proceeding*'" [emphasis added, *Lane, supra*, 541 U.S. 509, 546] [10]

In addition, this Court had recognized beforehand that the intent of the ADA was to determine a citizen's qualified disabilities on an *individualized* basis. [emphasis added see 42 U.S.C.¶ 12102 (2) (A) & (B)- see *Sutton* v *United Airlines,* 527 U.S. 471, 483-484 (1999); *Albertson's Inc.* v *Kirkingburg,* 527 U.S. 555, 565 (1999); *Bragdon* v *Abbott,* 524 U.S.624, 648-655 (1998) and at 664 O'Connor J., and at 657 Rehnquist C.J. Scalia J. Thomas J. each concurring in the judgment and dissenting in part] Further, the difficulty for the trier of fact to understand complicated medical issues in the field of neurology was best thought to be resolved "upon medical judgments". [see

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[10] The State Bar's main argument is in essence the "as applied" doctrine that this Court discussed. Petitioner maintains that this term bars dismissal based upon theoretical propositions that are not before the Court. Therefore, the contention raised by the State of Tennessee that the entire statute was invalid because the language included "state owned hockey rinks", was not the issue that was presented by the parties before the Court. [see *Lane* at 530] This was similar in tone to the defendant in *Raines* arguing that the entire statute was void as it could ostensibly apply to any person. [see *United States* v *Raines,* 362 U.S. 17, 25-26 (1960) "any person" i.e. an Anglo-Saxon] The Court in *Lane* did not exclude all other individuals with qualified disabilities. To do so would exclude the hearing and visually impaired after they obtained entry into the judiciary itself. [Point I[A][ii][a] page 13 ft. note 8 above] With all due respect this proposition is misplaced.

School Board of Nassau County v *Arline*, 480 U.S. 273, at 280, & 288, (1987) further citations omitted]

As petitioner's neurological disability is defined by Congress to be "significant" [29 U.S.C. ¶ 705(21)(a)(iii) – see page 2 ft. note 1 above] and as the outright exclusion of relevant expert testimony precluded petitioner to communicate to the Court, this does fall within the "congruence and proportionality" test. [see i.e. *Tennessee* v *Lane*, *supra*. 541 U.S. 509, at 531 also see *Nevada Dep't. of Human Services* v *Hibbs*, 538 U.S. 721, 727-728 (2003) -- also see Dr. Luciano's 3 medical reports *at App. 22a-25a & 26a-31a & 32a-33a*]

This places petitioner in the "zone of interest" of Title II and *Lane*. [see i.e. *Data Processing Services* v *Camp*, 397 U.S. 150, 153 (1970); also see *Grove City College* v *Bell*, 465 U.S. 555, 571 n. 21; (1980) and *Craig* v *Boren*, 429 U.S. 190, 195-197 (1976)]

POINT II

[A]: *Maintaining the date of the hearing in light of Lane deprived petitioner of meaningful opportunity to be heard. An expedited hearing after May 17, 2004, deprives petitioner of due process.*

The charges and answer were filed in January and February of 2004. A conference was held on March 15th. The date of the hearing was conditionally set for August 3, 2004. A secondary point was to preserve the right to dismiss the charges as a result of the then pending

Lane case. [11]

This Court has long recognized that due process entails a variety of factors including the scheduled time and its significance. As this Court set forth:

> Ct: "The timing and nature of the required hearing "' will depend on appropriate accommodation of the competing interests involved."'[*Logan* v *Zimmerman Brush Co.*, 455 U.S. 422, 434, (1982) quoting *Goss* v *Lopez*, 419 U.S. 565, at 579 (1975)] These include the importance of the private interest and the length or finality of the deprivation, [emphasis added see *Memphis Light, Gas, & Water Div. v Craft,* 436 U.S. 1, at 19 (1978) and *Mathews* v *Eldridge*, 424 U.S. 319, at 334-335 (1976) the likelihood of governmental error, [*Mathews id*, at 335] and the magnitude of the governmental interests involved, [see *ibid.*, and *Wolff* v *McDonnell,* 418 U.S. 539, 561-563, (1974)]

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[11] The denial of the motion to dismiss is a non-final decree. [see California Rules of Court ¶ 952 (c) – see *App. 3a; 4a and 1a*] The essence to it was that the expedited hearing was limited and restricted and no longer constitutionally proper. [see B & P ¶ 6049.1] The motion was denied by the entire review department on August 16, 2004. This is now before this court.

Point II [B]:

Failing to set aside default deprives petitioner of access to court and due process.

Petitioner incorporates by reference subdivision (iii) of the statement of the case above. [pages 7-9]

In addition, the State Bar knew that they could direct petitioner to testify at the expedited hearing. [see *Matter of Frazier*, 1 Cal. State Bar Ct. 676, 696 ft. note 5 (Review Dep't. 1991) quoting Cal. Code of Civil Procedure ¶ 1990].

The ramifications of being medically incapable to represent oneself, and/or, to have further neurological disorders, were set forth to the State Bar to no avail. [see Dr. Luciano's medical report dated November 4, 2004 at *App. 26a-31a*]

Given this predicament, it would have been proper to extend the scheduled hearing and not punish petitioner for his failure to appear. Due process cannot be constrained to a square box without taking important factors into consideration such as potential medical consequences and the import of retaining one's license. [see Point V page 26 below] As this Court has set forth:

> Ct: Due process is not a mechanical instrument. *It is not a yardstick.* [emphasis added, *Joint Anti-Fascist Committee* v *McGrath*, 341 U.S.123, 163 (1951) Frankfurter J. concurring]

> Ct: " The *right* to be heard *before* being condemned to suffer grievous loss of *any kind*, even though it

may not involve the stigma and hardships of a criminal conviction, is a principle *basic to our society*." [emphasis added *Wisconsin* v *Constantineau*, 400 U.S. 433, 437, (1971) quoting *Joint Anti-Fascist Committee supra* at 163]

Ct*: Due process is flexible* and calls for such *procedural protections as the particular situation demands.* [emphasis added, *Morrissey* v *Brewer*, 408 U.S. 471, 481 (1972)]

Ct: " The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." [emphasis added *Mathews* v *Eldridge*, 424 U.S. 319, 333 (1972) quoting *Armstrong* v *Manzo,* 380 U.S. 545, 552 (1965)]

Point III:

Outright exclusion of neurological expert testimony defeats collateral estoppel. Petitioner has met its burden. [B & P ¶ 6049.1 (b)(3)].

As the Honorable Judge Traynor set forth in the seminal case concerning issue and claim preclusion:

Court: The doctrine also serves to protect persons from being twice vexed for the same cause. [citation omitted] It *must*, however, *conform* to *the mandates of due process* of law that no person be deprived of personal or property rights by a judgment without notice *and opportunity to be heard.*" [emphasis added *Bernhard* v *Bank of America*, 19 Cal. 2d 805, 122 P.2d 892, 894, (1942) at Point II[B] page 24 of brief filed March 2, 2005, and interlocutory appeal

of motion to dismiss filed August 2, 2004 and in all other briefs thereafter] [12]

Point IV:

Expert opinions offered by petitioner are admissible.

[A]: *Evidence cannot continue to be ignored pursuant to Act of Congress.*

This Court in *Erie* made clear that in no event does substantive state law apply when it is conflict with "matters governed by the Federal Constitution or by Acts of Congress." [*Erie R. Co.,* v *Tompkins*, 304 U.S. 64, 78 (1938)] The right to participate and communicate a defense on behalf of a citizen with a qualified disability is such a right. It was passed under ¶ 5 of the Fourteenth Amendment. [*Lane supra*]

The State Bar's position is that it has no obligation to look into the exclusion of relevant evidence by the sister state. In essence, the State Bar and Court have cut off Title II and due process to a time period before the party enters

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[12] The Medical Board in *Hason* made certain to review all pertinent medical opinions that were offered. This did provide *Hason* the opportunity to be heard for which collateral estoppel was properly applied. [see *Hason* v *Department of Health*, 295 A.D. 2d 818, 821 (3d Dep't) (2002); see Point II[E] pages 34-36 to petitioner's brief filed March 2, 2005] Without any review of material neurological evidence and with the import of Title II having been acknowledged after the sister state proceedings terminated, it is petitioner's claim that he has met his burden demonstrating that the former proceedings "lacked fundamental constitutional protection." [B & P ¶ 6049.1(b)(3) at *App. 54a*]

the courtroom. [see entire brief filed by State Bar and declaration of July 9, 2004]

This is contrary to the language of the statute itself [Point I [a][ii] [A] pages 10-13] and inconsistent with the core to what the 14th Amendment stands for. It is petitioner's point that proper access to the courthouse applies before the case is placed on the calendar as well as after the parties are inside the judiciary itself. They are interchangeable. It is the fundamental right to have the opportunity to be heard that is the nucleus to these propositions. This is what due process seeks to protect.

The State Bar's argument is further contrary to the principles of abrogation pursuant to the Eleventh Amendment and the law of the land under the Supremacy Clause. [see Points VI [A] & [B] below at pages 27-29]

Point IV [B]:

The neurological recovery process is within the scope of experts special knowledge under FRE and Daubert.

The expert opinions of Dr. Parker and Dr. Luciano each fall within the admissibility test as set forth by this Court and the Federal Rules of Evidence. [see FRE ¶ 702 *Daubert* v *Merryl Dow*, *supra.*, 509 U.S. 579 (1993)]

Neurologist

The offered testimony of Dr. Luciano is based upon sufficient medical facts respecting petitioner. He is the Director of the Clinical Epilepsy Program at NYU Comprehensive Epilepsy Center. [*App. 26a & 32a*] His knowledge of the method in which the left temporal lobe

functions, and the process for which it is capable of healing, is relevant to petitioner's defense to the charges of impropriety.

Petitioner reiterates the statement of facts pages 2-9 and Point I [A][ii][b] pages 13-17, respecting the recovery process of the left temporal lobe as well as the negative effects of having seizure disorders immediately before a scheduled trial. [see *App. 32a-33a* and at *26a-31a*]

Neuropsychologist

Petitioner reiterates the statement of facts at pages 2-9 above.

Dr. Parker's opinions are also relevant under the principles of FRE 702 and *Daubert*. He has written two books on the subject of traumatic brain injury, and has published fifty six (56) professional articles in this area. [see *App. at 34a* and resume attached as exhibit "B" to motion to vacate default filed September 27, 2004]

As noted, Dr. Parker's professional opinion sets forth that the court of New York made two (2) distinct errors. The first was the finding that petitioner made a full recovery in 1985. [see *In re Stevens*, 294 A.D. 2d 1, 6 (2002)] The second was that he had no standing to investigate the patient to form a neurological opinion as he did not have a "prior relationship" with petitioner. [see page 15 of August 25, 2001 report of referee]

Each of these principles were discounted by Dr. Parker. The first one was seen as a standard error of judgment. The second was in part predicated upon the community of experts in the field of neurological disorders.

Respecting the recovery taking place in 1985, Dr. Parker set forth as follows:

> The undersigned respectfully disagrees. It is a matter of *common professional experience* that brain injured persons frequently return to work before recovery is substantially complete. Thus, the mere fact of return to work is no proof whatsoever that there is no causal connection between the brain injury and subsequent behavior." [emphasis added report dated September 27, 2004 at *App.36a*]

"Common professional experience" strongly suggests that this finding is a classic error or misconception of the public at large. The Appellate Division found that it was petitioner that did not come forward with any evidence to support a "causal connection" between 1984 and 1996. [*In re Stevens, id.* at 6] But it was the same court's "outright exclusion" [*Lane supra*] that barred petitioner to have the opportunity to establish this. Each of the States shift the burden of persuasion and proof upon the party that attempted to prove the connection at all times. [see Point II [A] page 18 ft. note 11]

To disprove the concept of petitioner being healthy as of 1985, coupled with demonstrating when each of the traits to the left temporal lobe had recovered, is relevant for purposes of petitioner's defense. It would '"assist the trier of fact to understand the evidence, [and/or] to determine a fact in issue."' [*Daubert, supra.* at 589 quoting FRE ¶ 702]

Secondly, the concept of there being "no prior relationship" as a basis for exclusion, is literally an unacceptable proposition to the community of experts that testify to matters in this field. Dr. Parker set forth that the

referee's point was the complete opposite to the communities view. As stated by Dr. Parker:

> "The referee excluded my testimony due to my lack of prior relationship with the potential examinee, Mr. Stevens. This is absolutely the predominant condition in the matter of expert witnesses. They are retained for the purpose of using their training and experience to inform the judge, jury, and/or other decision makers. Their role is differentiated from that of a different kind of testimony, i.e., the treating doctor. In professional discussion, I have heard colleagues suggest, in fact, that the treating doctor may have a conflict of interest should he or she be called upon to serve as expert witness.'
> [see opinion dated February 21, 2005 at *App. 39a*]

This point is based upon Dr. Parker's prior experience and "data" that is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." [see *Daubert, supra.*, 509 U.S. 579 at 595 citing FRE ¶ 703]

For these reasons, both the neurologist and neuropsychologist satisfy the threshold level of admissibility pursuant to the principles of *Daubert.*

Point V:

Taking of license by state is a property right effecting petitioner's livelihood. This raises a separate 14th Amendment deprivation and violates the privilege and immunity clause under Article IV ¶ 2 of the Constitution.

> Court: "Once licenses are issued..... their continued possession may become essential in the pursuit of a *livelihood*. Suspension of issued licenses thus involves *state action* that adjudicates important interests of the licensees. In such cases, the *licenses are not taken away without that procedural due process required by the Fourteenth Amendment.*" [emphasis added *Bell* v *Burson*, 402 U.S. 535, 539 (1971); citing *Snidach* v *Family Finance Group.*, 395 U.S. 337 (1969); *Goldberg* v *Kelly*, 397 U.S. 254 (1970)]

It is petitioner's point that Article IV ¶ 2 of the Constitution applies to both *"ingress and regress"* respecting "*trade and commerce*." This stems from the "Fourth Article of Confederation" [see *Hicklin* v *Orbeck*, 437 U.S. 518, at 532, (1978) citing *Baldwin* v *Montana Fish* 436 U.S. 371, at 379 ft. note 17 (1978)]

Article IV ¶ 2 applies when one's livelihood is effected. [see i.e. *Toomer* v *Witsell*, 334 U.S. 385 , 396-397 (1948); also see *Supreme Court of New Hampshire* v *Piper*, 470 U.S. 274, 283 (1985) further citations omitted *cf. Geer* v *Connecticut*, 161 U.S. 519, 521, 528-530 (1896) the "gaming" of "birds"—also see i.e. *Baldwin supra*, at 374 the hunting for "sport"]

Point VI:

Title II was at all times the law of the land. Petitioner has standing to raise the effect of Lane as it relates to the Supremacy Clause and abrogation.

[A]: *Supremacy Clause*

This Court together with the Sixth Circuit relied upon the due process clause in approving the passage of Title II under ¶ 5 of the Fourteenth Amendment. [see *Lane* at 522-523 et. al] In pertinent part the Sixth Circuit set forth:

> Court: *We held* that the Eleventh Amendment immunity barred claims under Title II of the American Disabilities Act based on equal protection violations but *Congress could abrogate Eleventh Amendment immunity as to due process claims."* [emphasis added *Lane v Tennessee,* 315 F. 3d 680, 681-682 (CA6) (2003) citing *Popovich* v *Cuyahoga County Court Common Pleas*, 276 F. 3d 808 (CA6) (2002) (*en banc*) *cert. denied*, 537 U.S. 832,.]

[also see *Hason* v *Medical Board of Cal, en banc.* denied, 294 F. 3d 1166,1171 (9th Cir.) (2002) dissenting opinions O'Scannlain, Kozinski; Nelson & Kleindfeld, J.J.J. *acknowledging Sixth Circuit's reasoning*]

As a result, there was never any change of any existing law. Congress passed Title II pursuant to ¶ 5 of the Fourteenth Amendment in order to protect citizens that it sought to protect from being deprived rights that fall under ¶ 1 thereof.

As this Court has previously set forth:

> When the State's financial immunity is abrogated it is no longer proper for the sister state to abide to constitutional defective proceedings. Congress passed Title II under its power vested under ¶ 5 of the Fourteenth Amendment. *Such legislation would only be approved by the United States Supreme Court if it would find that in doing so, it is protecting rights that fall under ¶ 1 of the Fourteenth Amendment. [emphasis added Seminole Tribe* v *Florida*, 517 U.S. 44, 59 (1996) quoting *Fitzpatrick* v *Bitzer*, 427 U.S. 445, 452-456 (1976)]

It can now be said that Title II was the Supreme law of the land. [see Article VI § 2 of the Constitution] The combination of abrogation and the Supremacy Clause fully supports preemption when the state is in conflict with the legislation. [see i.e. *Cippollone Ligget Group Inc* 505 U.S. 504, 516, (1992) and *Picquard* v *City of East Peoria*, 887 F. Supp. 1106, 1127 (C.D. Ill.) (1996) citing *Hines* v *Davidowitz*, 312 U.S.52, 67 (1941) further citations omitted].

Point VI [B]: *Abrogation*

As petitioner is not seeking damages, the underlying reason why the 11th Amendment was passed is not applicable. [see *Alden* v *Lane*, 527 U.S. 706, 716-178 & 719 (1999); citing *Chislom* v *Georgia*, 2 Dall. 419 (1793); also see i.e. *Edelman* v *Jordan*, 415 U.S. 651, 667-668 (1974) re: fiscal consequences to state treasuries]. [13]

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13 Further, petitioner exhausted all state remedies. The present petition is directly from a states final judgment. This nullifies any application of the Eleventh Amendment as well.

Petitioner maintains that at a minimum, the State officials are now bound by Title II on a prospective basis. [see i.e *University of Alabama* v *Garrett*, 531 U.S. 356, 374 ft. note 9 (2001) citing *Ex Parte Young*, 209 U.S. 123 (1908)]

Point VII:

This Court is not bound by the law of the case doctrine. Separate basis to support petition.

This Court granted a petition very recently regarding Title II. It is now pending. [*United States* v *Georgia*, 125 S. Ct. 2256; *cert. granted* May 16, 2005] Further, the denial of the prior petition for certiorari concerning the decision of New York was issued before this Court accepted jurisdiction in *Lane*. [Docket # 02-1259]

This supports the reopening, and/or, the granting of the petition. This is even after a prior one was denied. [see Supreme Court Practice, Eighth Ed. (2002) Stern,

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[*see* Tribe, Laurence H. , Intergovernmental Immunities in Litigation, Taxation & Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harvard Law Review, 682, 684 (1976); citing i.e. *Smith* v *Reeves*, 178 U.S. 436, 445 (1900) also see i.e. *Cohens* v *Virginia*, (6 Wheat) 19 U.S. 264, 381-383 (1821) --- *cf.* i.e. *Huffman* v *Pursue Ltd.*, 420 U.S. 592, 609 (1975) re: civil "appellate" remedies – and *Medical Board of Cal.* v *Hason, cert. granted*, 537 U.S. 1028 (2002) and *dismissed* April 7, 2003, at 538 U.S. 958 (2003) – plaintiff failed to exhaust state remedies]

However, the fact that the Eleventh Amendment does not provide a separate basis for dismissing any contention that is raised by petitioner against the State, this does not dispel his right to rely on the principle of abrogation in order to argue that Title II is now binding upon the States.

Gressman, Shapiro and Geller, at ¶ 15.6 (b) at page 730, citing i.e. *Zap* v *United States*, 330 U.S. 800 (1947); *Bradley Mining Co.*, v *Boice*, 345 U.S. 932 (1935); *Friend* v *United States*, 517 U.S. 1152 (1996); *Fuentes* v *United States*, 516 U.S. 1022 (1995)] [14]

Furthermore, this Court is not bound by the law of the case doctrine. [see *Messenger* v *Anderson*, 225 U.S. 436, 444; (1912) further citations omitted]

Petitioner affirms that the factual statements set forth above are accurate. It is submitted under the penalty of perjury, in good faith, and not for delay.

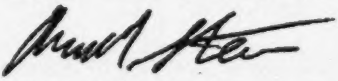
Conclusion

Petitioner respectfully prays that that this Court grant this Petition and

1. Issue a writ of certiorari and
2. That petitioner have such additional relief and process as may be necessary and appropriate.

Dated: June 25, 2005

Respectfully submitted,



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[14] The denial of a petition for certiorari does not "reflect the Court's views as to the merits of the case or as to its jurisdiction to hear the matter." [Supreme Court Practice *supra* at ¶ 5.7 page 306]

Appendix A

S129987
S.B.C. No. 02-J-13803

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RICHARD STEVENS, Petitioner

v

STATE BAR OF CALIFORNIA
Respondent

Petition for review is DENIED.

Geroge, Ch. J., was absent and did not participate.

Acting Chief Justice

Filed January 26, 2005

Appendix A

S130491

(State Bar Court Case No. 02-J-13803)

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE RICHARD STEVENS ON DISCIPLINE

Petition for review is DENIED.

It is hereby ordered that RICHARD STEVENS, State Bar No. 97167, be disbarred from the practice of law and that his name be stricken from the roll of attorneys. Respondent is also ordered to comply with rule 955 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar.

*(See Bus. And Prof. Code, ¶ 6126, subd.(c))

Filed April 27, 2005

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Clerk

_____

Chief Justice

Appendix A

THE STATE BAR COURT
HEARING DEPARTMENT – LOS ANGELES

In the Mater of	*) Case No.*
RICHARD STEVENS	*) 02-J-13803 JMR*
Member No. 97167	*) ORDER DENYING*
A Member of the State Bar	*) MOTION TO SET*
	) TO SET ASIDE
	)DEFAULT

FILED OCTOBER 25, 2004

On August 3, 2004, the court issued an order of entry of default and order of involuntary inactive enrollment based upon Respondent's failure to appear at trial. (Rules of State Bar., rule 201) On September 28, 2004, Respondent filed an untimely motion to vacate the default and involuntary inactive status, arguing for the first time, among other things, that as a result of a seizure on June 5, 2004, and other events on July 16, 2004, he thought that it was prudent not to make a personal appearance on August 3, 2004. (Respondent's declaration, filed September 28, 2004, pp. 2-3, ¶ 4-5) On October 4, 2004, the Office of the Chief Trial Counsel of the State Bar filed its opposition contending that the motion is both procedurally and substantively insufficient. On October 5, 2004, Respondent filed his reply declaration, and on October 12, 2004, he filed a correction in support of his motion.

After carefully considering all pleadings, the court finds no good cause to set aside Respondent's default. Respondent's motion to vacate and the order of involuntary inactive enrollment is DENIED.

Dated: October 25, 2004

JOANN M. REMKE
Judge of the State Bar Court

REVIEW DEPARTMENT OF THE STATE BAR COURT IN BANK

In the Mater of	*) Case No.*
RICHARD STEVENS	*) 02-J-13803 JMR*
Member No. 97167	*) ORDER*
A Member of the State Bar	*)*

No abuse of discretion or error of law having been shown, Richard Stevens's petition for interlocutory review filed on November 17, 2004, is denied.

Filed December 3, 2004

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Presiding Judge

Appendix A

THE STATE BAR COURT
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	) Case No. 02-J-13803
Richard Stevens	) Decision and order of
Member No. 97167	) Involuntary Inactive
A Member of the State Bar	) Enrollment

FILED
October 25, 2004

INTRODUCTION

In this disciplinary matter which proceeded by default, Kevin Taylor appeared for the Office of the Chief Trial Counsel of the State Bar of California. (State Bar). Although Respondent, Richard Stevens, appeared at status conferences, he did not appear at the trial in this proceeding either in person or by counsel and therefore his default was properly entered.

On May 16, 2002, the Supreme Court, Appellate Division, First Judicial Department of the State of New York filed an order disbarring Respondent from the practice of law for intentional misappropriation and other conduct in violation of his duties and obligations as a lawyer. As a result, the State Bar filed a notice of disciplinary charges (NDC) in accordance with the provisions of Business and Professions Code section 6049.1 [1] and rules 620 through 625 of the Rules of Procedure of the State Bar of California (Rules of Procedure).

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[1] Unless otherwise noted, all further references to "section" refer to Business and Professions Code.

The issues in this proceeding are limited to: (1): the degree of discipline to be imposed upon Respondent in California; (2) whether, as a matter of law, Respondent's culpability in the New York proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of Respondent's misconduct in New York; and (3) whether the New York proceeding lacked fundamental constitutional protections. (Bus. & Prof. Code ¶ 6049.1(b)) [2]

For the reasons set forth below, the court recommends that Respondent be disbarred from the practice of law in California.

II. SIGNIFICANT PROCEDURAL HISTORY

On January 30, 2004, the State Bar initiated these proceedings by filing the NDC in case number 02-J-13803. On February 24, 2004, Respondent filed a response to the NDC.

During a telephonic telephone conference conducted on March 15, 2004, which the State Bar and respondent attended, the court set the matter for trial commencing August 3, 2004, at 9:30 a.m.

Respondent did not appear at the August 3, 2004 trial. Consequently, on that date the court entered Respondent's default in accordance with Rule 201 of the Rules of Procedure and enrolled him inactive effective three

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[2] Respondent bears the burden of establishing the last two issues. Since Respondent did not participate in this proceeding, the court's primary issue is the degree of discipline to impose.

days after the service of the order. On that same date the court admitted into evidence State Bar trial exhibits 1,2,4, and 5 and took judicial notice of Respondent's verified answer to the NDC filed February 24, 2004, and State Bar Exhibit 3 which contains relevant sections of the New York State Bar Association's Lawyer's Code of Professional Responsibility. [3] The matter was ordered to stand submitted on all issues on August 20, 2004, if no further evidence was received.

On August 18, 2004, the State Bar filed a Brief on Culpability and Discipline Following the Entry of Default at Trial.

III. Findings of Fact and Conclusions of Law

Section 6049.1(a) provides that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct in this state. Furthermore, section 6049.1(d) provides that a certified copy of any portion of the record of disciplinary proceedings may be received in evidence.

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[3] The State Bar's admitted exhibits consist of certified copies of a disbarment order and opinion of May 16, 2002, by the New York Suporeme Court, Appellate Division, First Judicial Department; a letter from the U.S.Supreme Court dated April 21, 2003; a Notice of Entry from the New York Court of Appeals dated September 23, 2002; and a certified copy of the Notice of Entry from the New York Supreme Court, Appellate Division, First Judicial Department, dated November 6, 2002.

Appendix A

The court's factual findings are based upon Respondent's verified response to the NDC, the New York State Lawyer's Code of Professional Responsibility, and the documents relevant to Respondent's discipline in New York.

1. Jurisdiction

Respondent was admitted to the practice in the State of California on April 3, 1981, and has been a member of the State Bar at all times since.

II. Respondent's New York Discipline

The record of the New York proceeding conclusively establishes that the Appellate Division First Department, of the Supreme Court of the State of New York disbarred Respondent on May 16, 2002, after a hearing panel confirmed a referee's findings of fact, conclusions of law and recommendation of disbarment and restitution in the amount of $ 115,000. The per curiam opinion of the New York Supreme Court, Appellate Division, First Judicial Department dated May 16, 2002, sets forth the following facts.

1. New York Jurisdiction

Respondent was admitted to practice in the state of New York on July 26, 2982.

2. Facts and Circumstances Surrounding Repsondent's Misconduct

On February 26, 2001, Respondent was charged with intentional conversion of $ 115,000 of a client's funds held in escrow, misrepresentations to a bonding company, gross misuse of this client's escrow account and intentionally prejudicing his client in violation of disciplinary rules 1-102(a)(4), 1-102(A)(7), 7-101(A)(3), 9-102(a) 9-102(B), 9-102(D), and 9-102(E) of the New York Lawyer's Code of Professional Responsibility (hereinafter "disciplinary rule")

In his answer to the charges, Respondent admitted that he wrote checks to "cash" and made ATM transfers on his escrow account. During the evidentiary hearing he did not contest that he commingled funds and failed to maintain proper bookkeeping records of his escrow account.

After holding evidentiary hearings on June 21, 25, and 27, 2001, a Special Referee sustained all charges against Respondent, and in a report dated August 25, 2001, recommended that Petitioner be disbarred.

On November 6, 2001, a Hearing Panel confirmed the Special Referee's findings of fact and recommendation of disbarment.

Respondent's ethical misconduct stems from his representations of Laurie Thompson who appealed an adverse civil judgment. Although there was no written retainer agreement, throughout 1997 Thompson paid Respondent $ 92,000 in legal fees. Thompson's payments to Respondent were made pursuant to his oral requests. Not one payment to Respondents was made to a bill or statement until after November 1997.

Thompson also gave Respondent $ 115,000 as collateral for an appeal bond to be paid in the event she lost to her appeal. Respondent deposited the $ 115,000 in his

escrow account which already held approximately $ 50,000.00 in legal fees that Thompson had already paid Respondent. As a result, the Special Referee found, and Respondent did not dispute, that he improperly commingled his own funds with that of a client in violation of disciplinary rule 9-102(A).

By letter dated August 6, 1997, Respondent informed the bonding company, Fidelity and Deposit Company of Maryland that he was " holding $ 114,000.00 (sic)" in his escrow account to indemnify Fidelity for any loss incurred in connection with the appeal bond. Respondent also represented that the funds would not be released to anyone else without first receiving written approval to do so from Fidelity. It is undisputed that between August 7, 1997, to August 1998, Respondent completely depleted Thompson's money from his escrow account. By August 13, 1998, Respondent's escrow account balance was $ 45.23.

Thompson lost her appeal and was ordered to pay $ 95,000 in attorney's fees plus interest and costs. As Fidelity was liable on its bond for this amount, it sought recovery from Respondent. Respondent explained to Fidelity that he had taken the $ 115,000 as his legal fee with Thompson's consent. Respondent further informed Fidelity to seek recovery from Thompson and offered to assign any outstanding claim he might have against Thompson to Fidelity.

Thompson denied ever giving Respondent authorization to make withdrawals against the $ 115,000 collateral as payment for legal fees owed. According to Thompson and her son, Respondent admitted to them that he had taken $ 40.000 from the escrow account and that he

could be imprisoned or disbarred for such an act, but Respondent failed to inform Thompson of any other withdrawals against her collateral. In two letters from Respondent to Thompson dated November 10, 1997 and February 6, 1998, Respondent set forth fees Thompson owed him but did not credit her for the fees she had already paid to him or any sums he had taken from the escrow account. Thompson only learned of the depletion of her collateral from the bonding company and ultimately had to repay Fidelity herself.

Based on the testimony of Thompson and her son and Respondent's billing correspondence, the Special Referee determined that Respondent withdrew Thompson's funds surreptitiously and without authority, falsely claimed that he had Thompson's consent to remove the funds, enriched himself at Thompson's expense, and was not entitled to self-help by virtue of an account stated or retaining lien.

Respondent's conduct was deemed to violate the following New York ethics rules:

(1) By intentionally converting funds, Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of disciplinary rule 1-102(a)(4).

(2) By falsely representing to the boding company that he would hold the $ 115,000 to indemnify Fidelity and that he had Thompson's consent to take the $115,000 as his legal fees, Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of disciplinary rule 1-102(A)(4);

(3) By sending self-serving and self justifying letters to Fidelity at Thompson's expense, Respondent intentionally prejudiced or damaged a client in the course of the professional relationship in violation of disciplinary rule 7-101(A)(3).

(4) By failing to preserve the identity of Thompson's funds, Respondent misappropriated and failed to maintain in trust a client's funds in violation of disciplinary rules 9-102(A) and 9-102(B);

(5) By making numerous cash and ATM withdrawals from his escrow account, Respondent made escrow withdrawals by means other than by check or bank transfer in violation of 9-102(E);

(6) By commingling his funds with client funds, Respondent violated disciplinary rule 9-102(A); and

(7) By committing the above acts, Respondent engaged in conduct that adversely reflects on his fitness as a lawyer in violation of disciplinary rule 1-102(a)(7).

Respondent unsuccessfully appealed the disciplinary decision to the Supreme Court of the State of New York and U.S. Supreme Court.

C. Legal Conclusions

Although Respondent's culpability for ethical misconduct in New York was subject to a lower standard of proof, the court finds that sufficient evidence has been presented in the current proceeding to clearly and convincingly establish Respondent's culpability in California. [*In the Matter of Jenkins*, (Review Department 2000) 4 Cal. State Bar. Ct. Rptr. 157 [Attorney disbarred in Michigan using preponderance of evidence standard also

disbarred in California because evidence presented in California met higher standard])

The court finds that Respondent's misconduct would have violated rule 4-100(A) of the California Rules of Professional Conduct, [4] and section 6106 of the California Business and Professions Code. [5]

1. Rule 4-100 (a) (Failing to Maintain Client Funds in Trust)

Rule 4-100 (A) requires an attorney to deposit and maintain funds in a bank account labeled "Trust Account" "Client's Funds Account" or words of similar import all funds received or held for the benefit of clients.

By depleting Thompson's $ 115,000 to a mere $45.23, Respondent failed to maintain client funds in trust in wilful violation of rule 4-100(A)

2. Rule 4-100(A) (Commingling)

Rule 4-100(A) prohibits an attorney from commingling funds belonging to him with funds received or held for the benefit of clients.

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[4] Unless otherwise noted, all further references to "rule(s)" refer to the California Rules of Professional Conduct.

[5] The NDC also alleges that Respondent's ethical misconduct in New York constitutes violations of rules 4-100(B)(3) (Failure to Maintain Records and Render Accounting of Clinet Funds) and 4-100(A) (Collection of Illegal or Unconscionable Fee). In its closing brief the State Bar determined it would no longer pursue these charges.

There is no evidence that the approximately $50,000 in legal fees Respondent maintained in his escrow account was an advanced payment of attorneys fees. Furthermore, Respondent never tendered a written bill or statement to Thompson who would comply with Respondent's oral request for attorneys fees. The court concluded that Thompson's payment of fees pursuant to Respondents oral requests was for work Respondent performed or allegedly performed on her behalf.

By failing to withdraw the approximately $ 50,000 Thompson paid him in attorney fees from his escrow account prior to depositing Thompson's $115,000 bond collateral, Respondent commingled his personal funds with client funds in wilful violation of rule 4-100 (A).

3. Section 6106 (Moral Turpitude – Misappropriation)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption.

By intentionally converting approximately $ 115,000 of Thompson's funds, Respondent committed an act involving moral turpitude, dishonesty, corruption, in wilful violation of section 6106.

4. Section 6106 (Moral Turpitude – Misrepresentation)

By falsely representing to the bonding company that he would hold Thompson's $115,000 to indemnify Fidelity and that he had Thompson's consent to take the $115,000 as his legal fees, Respondent committed acts involving moral turpitude, dishonesty, or corruption in

wilful violation of section 6106.

5. Additional Misconduct

The State Bar urges the court to find Respondent engaged in additional acts of moral turpitude when he intentionally prejudiced or damaged Thompson to further his personal interests.

In support of this finding, the State Bar asserts that the New York decision concludes that Respondent's statement to Fidelity to seek recovery from Thompson and his offer to assign any outstanding claim against Thompson to Fidelity form the basis for finding that Respondent pursued his self-interest at the expense of prejudicing Thompson in violation of disciplinary rule 7-101(A)(3). The court disagrees. The decision specifically states that it was Respondent's sending of self-serving and self justifying letters to Fidelity at Thompson's expense which forms the basis of the finding that Respondent intentionally prejudiced and damaged Thompson. It is unclear from the decision whether Respondent's statement and offer to Fidelity were conveyed orally or in writing since the decision only references Respondent's August 6, 1997, letter to Fidelity in which Respondent informs Fidelity that he is holding Thompson's money to indemnify the surety. This misrepresentation already forms the basis of a separate moral turpitude finding.

Since the New York decision does not identify specific letters of their content for the disciplinary rule 7-101(A)(3) violation, the court declines to find that by intentionally prejudicing or damaging Thompson, Respondent committed additional acts of moral turpitude.

The State Bar also argues that by advising Fidelity to seek recovery from Thompson and offering to assign any outstanding claim he might have against Thompson to Fidelity, Respondent committed acts of dishonesty and corruption. No such finding was made in the New York proceeding and this court fails to seen how Respondent's statements, standing alone, are inherently dishonest or corrupt.

IV. LEVEL OF DISCIPLINE

I. Factors in Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence, and since he did not participate in the trial of this proceeding and his default was entered, no mitigating evidence was presented. However, for the purpose of mitigation, the court takes judicial notice, pursuant to Evidence Code section 452(h), of the membership records of the State Bar and the fact that Respondent has no prior record of discipline. (Standard 1.2(e)(1), Rules Proc. of State Bar, tit IV, Stds. ForAatty. Sanctions for Prof. Misconduct (Standards)) Respondent had been in practice approximately sixteen years prior to the start of his misconduct in the Thompson matter. The court, therefore, considers Respondent's absence of a prior record of discipline as an appropriate factor in mitigation.

B. Factors in Aggravation

Respondent's multiple acts of misconduct are an

aggravating factor. (Standard 1.2(b)(ii))

Respondent's conduct significantly harmed his client. (Standard 1.2(b)(iv).) Thompson ultimately was required to repay Fidelity herself since Respondent converted the funds intended to secure Fidelity.

Respondent displayed indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) The Special Referee found that except for apologizing for violating disciplinary rule 9-102, Respondent expressed no remorse and was unwilling or unable to acknowledge his responsibility for his misconduct.

Respondent's lack of candor and cooperation with the State Bar during a disciplinary proceeding, evidenced by this failure to participate to trial necessitating entry of default, is an aggravating circumstance. (Standard 1.2(b)(vi))

C. Discussion

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standard for attorneys. (*Chadwick* v *State Bar* (1989) 49 Cal. 3d 103, 111; Standard 1.3)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions.

Standard 2.2(a) provides for disbarment when a member wilfully misappropriates entrusted funds.

Standard 2.3 provides for disbarment when a member commits an act of moral turpitude, fraud, or intentional dishonesty, depending upon the magnitude of the misconduct, the degree to which it relates to the practice of law, and the extent of harm to any victim.

The standards, however, are guidelines frc m which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter. (*Howard* v *State Bar*, (1990) 51 Cal. 3d 215.) "They are not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary* v *State Bar.*, (1988) 44 Cal. 3d 820, 828)

Respondent has been found culpable of failing to maintain client funds in trust, commingling and multiple acts of moral turpitude by intentionally misappropriating approximately $ 115,000 in client funds and making intentional misrepresentations. There is mitigation for the lack of a prior record of discipline for approximately sixteen years. In aggravation, the court has found multiple acts of misconduct, significant client harm, indifference toward rectification or atonement, and failure to participate in the proceeding.

The court considers the following intentional misappropriation cases instructive in determining the appropriate level of discipline.

In *Weber* v *State Bar*, (1988) 47 Cal. 3d. 492, an attorney was disbarred for misappropriating over $ 24,000 form an estate and for failing to obey court orders, intentionally writing a check against insufficient funds, commingling and making misrepresentations to the court

and his client. In mitigation, the attorney had no priors. In aggravation the attorney displayed a lack of contrition or recognition of wrongdoing.

In *In Re Kueker* (Review Dept. 1991) 1 Cal. State Ct. Rptr. 583, an attorney was disbarred after he misappropriated $ 66,000 in entrusted funds and repeatedly lied to a client's agent in order to conceal the theft. The attorney had no priors in fourteen years of practice, but displayed a lack of candor or cooperation during the investigation of his misconduct.

Similarly, Respondent's misconduct parallels *Weber* in that Respondent misappropriated a substantial sum of money, commingled, committed acts of moral turpitude by making misrepresentations, had no prior record of discipline and showed indifference toward rectification or atonement for his wrongdoing. Unlike *Weber*, Respondent also displayed a lack of candor or cooperation, significantly harmed a client and misappropriated more than five times as much money.

Respondent's facts are more egregious than those of *Kueker* since Respondent misappropriated significantly more money, committed additional ethical misconduct, and has more factors in aggravation.

Since Respondent's misconduct and factors in aggravation are more extensive than those in either *Weber* or *Kueker*, Respondent's discipline should be no less severe than that imposed in those cases.

In determining the appropriate level of discipline, the court is mindful of case law which holds that an attorney who has misappropriated client funds will generally be disbarred absent strong extenuating circumstances. (*Harford* v *State Bar*, (1990) 52 Cal. 3d 93,

100; *Chang* v *State Bar*, (1989) 49 Cal. 3d 114, 128)

The State Bar recommends, among other things, Respondent's disbarment.

After considering Respondent's misconduct and the law and balancing the aggravating and mitigating factors, the court agrees with the State Bar and recommends Respondent's disbarment in order to protect the public, enforce professional standards and maintain public confidence.

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that Respondent RICHARD STEVENS be disbarred from the practice of law in the State of California and that his name stricken from the rolls of attorneys in this State.

It is also recommended that the Supreme Court order Respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

The court also recommends that costs be awarded to the State Bar pursuant to the State Bar pursuant to section 6086.10 and that the costs be payable in accordance with section 6140.7

VI. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary enrollment status pursuant to section 6007 (c) (4) and rule 220 (c) of the Rules of Procedure. The

Inactive enrollment shall become effective three days after service of this order.

Dated; October 25, 2004

_____
Joann M. Remke
Judge of the State Bar Court

(State Bar Court case No. 02-J-13803)

REVIEW DEPARTMENT OF THE STATE BAR COURT IN BANK

IN RE RICHARD STEVENS ON DISCIPLINE

It is hereby ordered that Richard Stevens, State Bar No. 97167, be disbarred from the practice of law and that his name be stricken from the roll of attorneys. Respondent is also ordered to comply with Rule 955 of the California Rules of Court, and to perform the acts specified in subdivisions (a) & (c) of that rule within 30 and 40 days, respectively, after the date this order is effective. * Costs are awarded to the State Bar.

*(See Bus. And Prof. Code, ¶ 6126, subd.(c))

January 5, 2005 Chief Justice

Appendix B

NYU Medical Center

NYU Comprehensive Epliepsy Center
403 East 34th Street, EPC, 4th floor
New York, N.Y. 10016

Tel: 212- 263-8853
Fax: 212-263-8342

EPILEPSY INITIAL VISIT NOTE

Visit Date: 9/22/04

Patient: Richard Stevens MRN:

NYUCEC Physician: Daniel Luciano

Primary Physician:

Referring Physician: Dr. Rolland Parker

Chief Complaint:

49 year old right-handed man referred by Dr. Rolland Parker.

History of Present Illness:

Mr. Stevens was involved in a hit and run accident 1/1/ 84. He was a pedestrian and was hit, sustaining serious head injury. He was found lying in the street and was quite combative.

He was in a coma for one month. Mr. Stevens was found to have open right fibula/tibia fracture. En route to Bellevue hospital Mr. Stevens suffered a witnessed tonic clonic seizure with the left sided deviation and altered mental status. A left temporal lobe contusion was noted and a subarachnoid screw was placed. He was placed on Dilantin, but rash occurred, leading to a change to phenobarbital 30 mg TID.

After coming out of his coma Mr. Stevens could not read or write, though he improved when phenobarbital was disconnected. He also had memory dysfunction.

In January 1985, Mr. Stevens experienced a seizure while playing tennis. His heart started to beat rapidly and he then lost consciousness. There was no description of the event and thee was no tongue biting or incontinence. Postictally he was not tired or confused. Mr. Stevens was brought to an emergency room and no special testing was performed.

Mr. Stevens then saw a Dr. Shey and an EEG on 3/26/85 was normal. A CT scan was performed and revealed encephalomalacia in the right frontal and left posterior temporal regions. A report by Dr. Shey notes complex partial seizure activity and Tegretol was commenced. A language disorder was noted.

Mr. Stevens did well on Tegretol and in 8/88 was tapered off. He did well with no medication until 1993. He then saw a Dr. Resor in consultation. In 1993 Mr. Stevens experienced an aura playing tennis. He cannot recall what he felt, but there was no alteration of awareness. He then experienced seizures once per month for about a year,

occurring with exercise. Some of these had an aura of imbalance and he occasionally fell. He was described as shaking and there was no incontinence or tongue biting. Postictally he would have major headache. He was not on antiepileptic medication at that point.

Dr. Resor then recommended Tegretol and from 5/94 until 6/5/04 he was seizure free except for three auras. He was able to fight there by speaking to himself. On 5/5/04 after working on the compute for 8 hours he went to the tennis court and had a seizure. During the event there was some mild shaking and he was out for 5 minutes. He did not miss medications and was not sleep deprived. Mr. Stevens was brought to St. Luke's Hospital. A Tegretol level was 3.7 (reportedly previously 5 in 10/03) His dose at the time was 200 mg BID (generic carbamazepine). On 7/16/04 another event occurred after a work-out. He slept afterward and got up, but kept falling repeatedly. The next morning he awoke with a very severe headache. There was no tongue biting or incontinence. After this event he decided to be checked medically. He saw Dr. Glick who referred him to Dr. Herbstein, a neurologist. Carbatrol was suggested. An EEG was normal. An MRI was reportedly normal.

Mr. Stevens is taking carbamazepine 200 mg 2 or 3 times per day. He denies any side effects associated with this medication.
Mr. Stevens has regained his speech skills over time.

Impression: Mr. Stevens has a history of post-traumatic partial epilepsy which I feel is secondary to his accident of 1/1/84. Mr. Stevens has experienced recent seizures and I have explained that I would recommend either increasing his carbamazepine to 200 mg three times a day or considering changing to another agent, such as Lamictal. I have explained the advantages of this agent, such as stimulant properties and improvements in mental processing speed, and have supplied Mr. Stevens with a package insert. He will consider such a conversion.

I have also explained that I agree with Mr. Stevens recently not taking multiple flights to California for a trial as he was at increased risk for seizures given such a schedule.

Plan: Mr. Stevens will continue his present regimen and will call me after considering the Lamictal.
I will otherwise see him again in 6 weeks time.
I have asked him to get his MRI scan for my inspection.

_____
Daniel Luciano

Appendix B

Daniel Luciano, MD
Assistant Professor of NYU School of Medicine
Director of Clinical Epilepsy Program

NYU Comprehensive Epliepsy Center
403 East 34th Street, EPC, 4th floor
New York, N.Y. 10016

NYU Medical Center

November 4, 2004

Re: Richard Stevens

To Whom it May Concern:

I am writing to you now regarding Mr. Richard Stevens, whom I evaluated for a seizure disorder. By way of introduction, I am presently an assistant professor of neurology in the NYU School of Medicine and dierctor of the NYU Clinical Epilepsy Program at the NYU Comprehensive Epilepsy Center. I trained in neurology and epilepsy at Mount Sinai Medical Center and am board certified in neurology and clinical nurophysiology by the American Board of Psychiatry and Neurology.
I have been an expert in the field of seizures and epilepsy since 1990 and my practice consists entirely of patients with such disorders.

Appendix B

I hereby reiterate my medical evaluations of Mr. Stevens dated September 22, 2004. [attached hereto] The underlying reason Mr. Stevens saw me was that he was intereseted in another opinion regarding his seizure disorder and possibly changing medication. He has been on Tegretol for the past 10 years and the doctor who saw him shortly after July 16, 2004, prescribed a hight dose of this medication. After revewing the history of Mr. Stevens coupled with the medical evidence of July 1985 (Dr. Shey) which included a CAT scan taken at that time, I discussed a change of medication to Lamictal. One reason for doing so was that a side-effect of Tegretol (that Mr. Stevens acknowledged) was that it causes a person to be fatigued during the course of the day. This led Mr. Stevens to drink coffee quite often. Thus, during the time period immediately after July 16, 2004 (30 days) Mr. Stevens pursuant to medical instructions, was taking 800mg of Tegretol, which is more that his system was accustomed to (400mg). After seeing me on September 22nd , he has changed his medication and reverted back to 400mg of Tegretol.

On page 4 of my September 22nd note, I stated that I agreed that it was medically prudent for Mr. Stevens not to fly to Los Angeles for a hearing set for August 3, 2004. I have been informed that the hearing involved Mr. Stevens to represent himself on a matter that is of serious magnitude. Among them is that it entails a great deal of pressure, as there are serious economic and professional consequences at issue. In this regard, a great deal of law and record of more than 500 pages is necessary.

If this is an accurate assessment of the hearing as revealed to me by Mr. Stevens, and there hearing was not for example a simple issue such as a traffic violation, then I reiterate my point that it was definitely prudent for Mr. Stevens to avoid the trial of August 3, 2004.

The underlying reason that I agree with Mr. Stevens is as follows:

A. The time period, from a medical perspective of the seriousness of the seizure, are the first 30 days. Nonmally, the patient's medication is changed and when this is done, it is imperative for the treating physician to have direct access to the patient. It is more likely for problems to occur during those initial 30 days then at any other time. Seizures are analagous to earthquakes as a person is inclined to have aftershocks. Such aftershocks are likley within 30 days after the seizure takes place. As time goes on this will taper off. Even if all goes well (which appears to be the case for Stevens) there is a likelihood of side effects that a person who had previously experienced seizures would know of and would most definitely want to avoid. The pressure of such a trial coupled with the change of venue by traveling 3000 miles the day before can lead to an imbalance that would result in an outright seizure and or a series of auras. Clearly, a seizure during the trial itself and/or on a flight to Los Angeles would be detrimental. Mr. Stevens would have to taken to a hospital and be tested. He would be late and would not appear at a hearing scheduled the next day. If that would be the case, his not appearing would medcially be far worst than his avoiding this by simply not taking the flight to Los Angeles.

B. A second major problems are auras. Indeed in some ways for purposes of complex litigation this is more damaging than an outright seizure and auras are more likely as well. An aura is in essence a partial seizure that does not transcend itself to a complete loss of consciousness. When one has an aura, concentration on the matter is extremely difficult. The victim is so absorbed with defeating the aura and regaining full harmony that he has a very difficult time in communicating. This especially is the case when the damage to the brain is to the patient's left temporal lobe. To be in the midst of cross-examination and/or to have to come to with a legal argument in an expedited fashion is truly a task that from a medical perspective would be virtually impossible. Therefore, when it is vital to preserve the record or lose that point forever, it would be reprehensible to bind a patient of his failure to raise this as a result of his having an aura and the judge or anyone who is not an expert would be completely unaware of any medical problem at that very time.

A separate point should be further made clear. A person who has had prior experinences in diverting his attention when he or she has an aura may want to change his demeanor by changing his environment immediately. Mr. Stevens has informed me that on numerous occasions he has done so picking himself up and going to the lavatory. From my experience this is not unusual, but it would be odd to say the least if Mr. Stevens would claim that he had to go to the bathroom in the midst of his being cross-examined or in the midst of his closing argument. Mr Stevens would not

be hallucinating nor would he be a drug addict, yet this is what the judge may conclude.

The patient who is going through an aura is doing so without shaking, but silently speaking to himself and having his brain redirect attention. By way of an analogy, it is a form of telepathy. In medical terms, the inhibitors are sought to defeat the exhibitors. In other words, the patient through this in the midst of trial that has serious economic consequences should medically and morally be avoided.

Auras are without question are more likely for a period of time shortly after an outright seizure. Once the system is in a tranquil environment for a period of time [i.e. 30 days] and no further seizures have taken place, the possibility of having auras would seriously be reduced. The bottom line for Mr. Stevens is that from a neurological perspective it was quite proper for him to avoid trial at all costs. He was a prime candidate for further problems in the new environment under the circumstances that a trial brings into the picture. As he had two episodes immediately before August 3, 2004, he should not have been required to fly back and forth for a one-day appearance at that time,

This does not allow me to state that Mr. Stevens is impaired to proceed in his livelihood as an attorney at any time. He merely had to avoid the type of anxiety 3000 miles away from his home base immediately after his seizure. As Mr. Stevens's system has now been calm for the past 90 days, there would be no medical reason for his not flying to Los Angeles at this sage. I merely maintain that is was very prudent for Mr. Stevens to avoid flying to

Los Angeles for a hearing on August 3, 2004. Having a seizure is not a pleasant experience.

Lastly, I can understand why a competitive person such as Mr. Stevens would not want to publicize his last two seizures. He has made a remarkable recovery and before June 5, 2004, had not had a seizure for over 10 years. Therefore, if he would have been able to avoid trial for another legal reason, it is understandable for him to rely on the alternative and keep his two recent episodes private.

Finally, what was not specifically set forth in my prior opinion of September 22, 2004, was that Mr. Steven's CAT-scan reveals damage in the left temporal lobe and right frontal area. The left temporal lobe affects both emotional and language skills whereas the right frontal area exclusively affects his emotional traits.

Respectfully yours,

_____

Daniel Luciano

Appendix B

NYU Comprehensive Epliepsy Center
560 First Avenue Rivergate 4th floor
NYC Medical Center
Mount Sinai
New York, N.Y. 10016
Tel: (212) 263-8853
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Daniel J. Luciano, M.D.
Director, of Clinical Epilepsy Program
Assistant Professor of NYU School of Medicine

Re: Richard Stevens: 2/18/05

To whom it may concern,

I, Daniel Luciano M.D., state under the penalty of perjury the following:

1) I am a board certified neurologist and, specifically, epileptologist with specialty training and certification in the treatment and diagnosis of seizure disorders. I have served a two year epilepsy/EEG fellowship at Mount Sinai Hospital in New York and am specifically board certified in clinic neurophysiology. I have been in private practice caring only for epilepsy patients at the NYU Comprehensive Epilepsy Center since 1990. I am the Director of the Clinical Epilepsy Program.

Appendix B

2) It should be initially pointed out that Mr. Stevens has in no manner compensated me for my opinion. I have reviewed the medical opinion of Dr. Emanuel Gordon dated 11/11/03. I have been asked to specifically discuss question # 3 which deals with the distinguishable recovery process regarding the temporal lobe.

3) The left temporal lobe is a crucial region of the brain as it is involved in language, memory and emotion. These functions are separate and distinct as far as recovery is concerned. In my professional career I have cared for perhaps 30 patients I can recall whose emotional recovery took longer than that of their cognitive abilities. This would be due to differential degrees of damage in various portions of the temporal lobe.

4) There is no question that the seizures Mr. Stevens suffered in 2004, as well as previous episodes, were directly related to his hit and run accident of 1/1/84. He never experienced seizures prior to the accident and there is no family history of seizures. I therefore feel that Mr. Stevens is entitled to be reimbursed for his medications.

Respectfully yours,

_____

Daniel Luciano, M.D.

Rolland S. Parker, Ph.D.
Consulting Neuropsychologist

AMERICAN BOARD OF
PROFESSIONA PSYCHOLOGY
(Clinical Neropsychchology:
Clinical Psychology)

Adjunct Professor of Clinical
Neurology, NYU Medical School

Correspondence and Billing
50 West 96th Street (9c)
New York, NY 10025
212-222-4543

September 27, 2004

Hon. Joann M. Remke
Judge of the State Bar of Court
180 Howard St.
San Francisco Ca. 94105

Dear Judge Remke:

I am writing to you at the request of Mr. Richard Stevens. I have records of a severe head/brain injury of 1/1/84, and various documents relating to a disciplinary problem he faced consequent to a complaint made about him in connection with his legal practice.

Appendix B

Please permit me to introduce myself. I am a specialist in traumatic brain injury, having written two textbooks in that area, conducted over 1000 comprehensive neuropsychological examinations of brain injury patients, developed multi-disciplinary training programs for professionals concerned with that area, and have been admitted as expert witness in Federal and State courts, workers compensation hearing, etc.

At present, I am serving as a neuropsychological consultant to Mr. Stevens for the purpose of providing professional information with regards to official statements concerning the adjudication of his request to be reinstated as an attorney. I have met with him, and had telephone conversations but never performed a formal neuropsychological examination. I was prepared to do so in 6/2001, but my potential testimony was excluded by Referee Feldman. To date, an important part of my consultation with Mr. Stevens has been to provide him with professional information concerning the nature of his injury, the significance of some information in the record, and the possible outcome over time.

Mr. Stevens has called my attention to particular details in the official records and asked me to offer my professional opinion. I am aware of the implication of my report and I affirm that the following statements are true and objective in my professional opinoin.

I. Lack of Prior Relationship: I understand that the referee excluded my potential expert testimony on the grounds that there was no indication of any prior relationship with the respondent or that he had anything to

offe- that would be relevant. In fact, Mr. Stevens was referred by me by a previous treating neuropsychologist (Dr. Rattock), who having retired and knew my work.

It is standard professional practice, when there is an issue of the effects or outcome of a brain injury, for the qualified practitioner to review the records, conduct a current examination, and offer and opinion as to functioning over a period of time. A familiar example, in criminal matters, is to render and opinon as to the defendant's motivation, reality testing, rationality, etc., at the prior occasion of the crime. The reported statement that there was no prior relationship does not reflect current practice at all in personal injury procedures. Experts are retained when judicial procedures (e.g. personal injury) are commenced.

II. Can a Current Examiner Assess Prior Status ?

In the Appellate Division report (page 6) the Referee asserted that since the respondent worked in a legal capacity sicne 1985, and there was no suggestion of current incapacity, there was no causal connection between the 1984 accident and the 1997-1998 misconduct. The undersigned respectfully disagrees. It is a matter of common professional experience that brain injured persons frequently return to work before recovery is even substantially complete. Thus, the mere fact of return to previous employment is no proof whatsoever that there was no causal connection between the brain injury and subsequent behavior. I an NOT asserting that Mr. Steven's actions were or were not related to his brain injury, only that employment is not evidence of recovery or no effect.

III: **Significance of the injuy pattern ?** A brain scan indicated damage to the right frontal and left temporal lobe regions. This pattern is consistent with intellectual and emotional dysfunctioning.

I am prepared to discuss this matter informally with Your Honor.

Respectfully submitted,

Rolland S. Parker, Ph.D.

Appendix B

Rolland S. Parker, Ph.D.
Consulting Neuropsychologist

AMERICAN BOARD OF
PROFESSIONA PSYCHOLOGY
(Clinical Neropsyhchology:
Clinical Psychology)

Adjunct Professor of Clinical
Neurology, NYU Medical School

Correspondence and Billing
50 West 96th Street [9(c)]
New York, NY 10025
212-222-4543

February 21, 2005

To Whom It May Concern:

In re Stevens: S 129987

This letter is a follow up to my letter of 9/27/04.

The referee's report of August 25, 2001 excluded my professional opinion and review of this matter. The reason offered was that I had no prior relationship with Mr. Stevens.

This decision is inconsistent with my personal experience as a neuropshychological examiner, full time since 1985, with prior experience as well. I have examined considerably over 1000 personal injury victims in a variety of jurisdictions (litigation and trial; family; no fault; workers

compensation; disability)

The referee excluded my testimony due to my lack of prior relationship with the potential examinee, Mr. Stevens. This is absolutely the predominant condition in the matter of expert witnesses. They are retained for the purpose of using their training and experience to inform the judge, jury, and/or other decision makers. Their role is differentiated from that of a different kind of testimony, i.e., the treating doctor. In professional discussion, I have heard colleagues suggest, in fact, that the treating doctor may have a conflict of interest should he or she be called upon to serve as expert witness.

I believe that a review of Mr. Steven's history and any available documents, with a current neuropsychological examination, will provide psychologial information of use to you with reference to any particular prior time period as well as his current status. I believe that it would have been appropriate for me to examine Mr. Stevens as proposed earlier in 2001.

I am not being compensated for this letter.

Respectfully submitted,

_____

Rolland S. Parker, Ph.D.

Appendix C

Page 1 col. 6

NEW YORK TIMES NATIONAL
FRIDAY, OCTOBER 30, 1998

ADULT BRAIN CELLS SAID TO REPRODUCE

New finding Opens Potential for Neurological Advances

By HOLCOMB B. NOBLE

Through a rare glimpse inside the human brain, a team of American and Swedish scientists reported yesterday that they had discovered the generation of brain cells in adult humans for the first time, opening an important area of investigation into possible new treatments for such debilitating neurological disprders as Alzheimer's disease, Parkinson's disease, and stroke.

The finding is one of a series of recent discoveries that have overturned years of conventional wisdom about the human brain: that, after birth, once brain cells died off, they could never be replaced. In one such finding last spring, scientists reported substantial new cell growth in the brains of developing children under age 6.

Now, with the discovery in adults that cells are continually dividing and producing mature new cells, the potential arises that this regeneration may be used to mend a brain damaged by disease, or treat a disease caused by a damaged brain.

"'The door has been opened,'" said Dr. Fred Gage, the team leader, at the Salk Institute for Biological Studies in San Diego, where the research was conducted in conjunction with Sahlgrenska University Hospital in Sweden. It will be published in November in the journal Nature Medicine.

Dr. Gage cautioned that much more research is needed to learn whether cell creation can be put to work. But, he said, "' the new research should prove interesting.

The new growth was discovered in

Continued on Page A29

Adult Brain Cells Are Replacable, Study Says

the hippocampus, a center of learning and memory in the brain. Dr. Bruce S. McEwen, a neurobiologist at Rockefeller University in New York, called the discovery an "' exciting development ------ the isolation of a specific part of the human brain where you actually caught a glimpse of new cells being produced"'. Dr. McEwen and Dr. Elizabeth Gould of Princeton University published findings last March on the discovery of neurogenesis as brain cell growth is called, in adult marmoset monkeys. Dr. Gage and

others had previously recorded it in rodents.

The new study was done in brain tissue taken in autopsies on five cncer patients at Sahlgrenska Hospital. In a range between about three weeks and two years before their deaths, the patients --- ages 55-70, in both early and advanced stages of the disease—were given injections of bromodeoxyuridine, a chemical marker, or tracer, to help determine later what was happening in the hippocampus. This chemical-tracing tecnique is now often used in cancer patients to determine whether malignant tumors are proliferating, which prompted the Gage team to use it to search for healthy cell production.

After the patients died, the researches used advanced imaging techniques to find the markers, and confirmed that undeveloped primitive cells had in fact divided and continued to divide, and produced new mature neurons as well. They also found indications that this process continues until death. It is not clear whether these primitive progenitor cells are actually stem cells, which have a powerful capacity in the formative stages of brain development for generating neurons that have a wide variety of functions, or whether their capacity is more limited.

Dr. William Greenough, a neuroscientist at the University of Illinois at Urbana-Champaign, called the Gage team's work "' incredibly clever."'

"' It provided science its first real retroactive look at a live human brain in the process of creating new cells,"' he said. "' And because of the presence of the

bromodioxyuridine markers in the DNA, the conclusions are absolutely credible.'"

Dr. McEwen, like Dr. Gage, pointed out that future projects will have to deterimine the precise functions of these new mature brain cells. In general, neurons play a wide range of roles in directing the operations of the body and mind. Scientists still do not know when they are produced, why they are produced or how long they can survive.

The conventional thinking that humans could not grow new brain cells was based on the lack of scientific evidence; no one would choose to cut open the brain of a living person to prove it. But 30 years ago, a Purdue University neurobiologist, Dr. Joseph Altman, first reported cell birth in the hippocampus of adult rats.

Finding proof for a notion once dismissed as fantasy.

Because of the strength of the thinking of the day his work was ignored. Then in the 80's Dr. Fernando Nottlebohm at Rockefeller found that, in the brains of adult birds that learned new songs, new cells were being created. When he tried to push the notion that the adult brain in animals and humans could potentially form new neurons, colleagues dismissed the idea as borderline fantasy.

But in the 1990's, with one animal study after another, the race was to determine why the adult human brain could not perform as effectively in this manner as those of rats, mice, tree shrews, and monkeys.

Before his collaboration with the Swedes, Dr. Gage and his group found that if they enhanced the living environments of the mice--- by giving them more space, more toys and fellow mice to play with --- the mice produced more new brain cells and performed better in behavioral tests.

This, Dr. Gage and others said, indictaes that there may be a way to manipulate the new cell growth in humans as well and make some difference in their physiology and brain function. "' We have to try to determine whether we might be ab le to have some positive control over how the human brain cells divide,"' said Dr. Gage. "' Once you know the chemicals and modulators that control division, you can imagine that under disease or trauma conditions you might be able to control this with beneficial results."'

The scientists emphasized that the hippocampus is one small area of the cerberal cortex where a vast number of brain functions occur. But it is the area where cell loss occurs in Alzheimer's patients, so its importance is real. Why this disease, and other neurological disorders, would occur despite the creation of new neurons replacing the old is one of the many questions now to be investigated.

An editorial in Nature Medicine said the discovery "'opens the possibility of autologous repair and regeneration"' in the brain. It noted that Parkinson's

disease, Huntington chorea and Alzheimer's all share a gradual loss of certain categories of neurons, and that " 'these losses might reflect not only the insult that causes the neurons to die, but a failure of an otherwise expected regeneration that ordinarily repairs the loss.'"

Last spring, William R. Shankle, a neurologist at the University of California, Irvine, reported in the Journal of Theoretical Biology on his analysis of hundreds of autopsies studied in Boston by J.L. Conel in the 1940's and 1950's. Dr. Shankle said the studies indicated tremendous growth in the number of cells in a child's brain from birth to age 6, adding some 400 billion. To him, that phenomenon, coupled with the Gage study, indicates that new cell growth may be found in areas of the adult brain outside of the hippocampus.

Dr. Shankle said experimentation might now begin with attempts to use the newly created hippocampus cells in treating asphyxia, caused by oxygen deprivation to hippocampus brain cells in drowning or smoke-inhalation victims or to treat some forms of memory loss.

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NEW YORK TIMES NATIONAL
THURSDAY, AUGUST 15, 2002

LANGUAGE GENE IS TRACED TO EMERGENCE OF HUMANS

By NICHOLAS WADE

A study of the genomes of people and chimpanzees has yielded a deep insight into the origin of language, one of the most distinctive human attributes and a critical step in human evolution.

The analysis indicates that language, on the evolutionary time scale, is a very recent development, having evolved only in the last 100,000 years or so.

The finding supports a novel theory advanced by Dr. Richard Klein, an archaeologist at Stanford University, who argues that the emergence of behaviorally modern humans about 50,000 years ago was set off by a major genetic change, most probably the acquisition of language.

The new study, by Dr. Svante Paabo and colleagues at the Max Planck Institute for Evolutionary Anthroplogy in Leipzing, Germany, is based on last year's discovery of the first human gene involved specifically in language.

Appendix C

The gene came to light through studies of a large London family, well known to linguists, 14 of whose 29 members are incapable of articulate speech but are otherwise mostly normal. A team of molecular biologists led by Dr. Anthony P. Monaco of the University of Oxford last year identified the gene that was causing the family's problems. Known as FOXP2, the gene is known to switch or other genes during the development of the brain, but is presumed role in setting up the neural circuitry of language is not understood.

Dr. Paabo's team has studied the evolutionay history of the FOXP2 gene by decoding the sequence of DNA letters in the versions of the gene possessed by mice, chimpanzees, and people.

In a report being published online today by the journal Nature, Dr. Paabo says the FOXP2 gene has remained largely unaltered during the evolution of mammals, but suddenly changed in humans after the hominid line had split off from the chimpanzee line of descent.

The changes in the human gene affect the structure of the protein at two sites, Dr. Paabo's team reports. One of them slightly alters the protein's shape; the other gives it a new role in the signaling circuitry of human cells.

The changes indicate that the gene has been under strong evolutionary pressure in humans. Also, the human form of the gene, with its two changes, seems to become universal in the human population, suggesting that it conferred some overwhelming benefit.

Appendix C

Dr. Paabo contends that humans must already have possessed some rudimentary form of language before the FOXP2 gene gained its two mutations. By conferring the ability for rapid articulation, the improved gene may have swept through the population, providing the finishing touch to the acquisition of language.

"'Maybe this gene provided the last perfection of language., making it totally modern,'" Dr. Paabo saide.

The affected members of the London family in which the defective version of FOXP2 was discovered do possess a form of language. Their principal defect seems to lie in a lack of fine control over the muscles of the throat and mouth, needed for rapid spped. But in tests they find written answers as hard as verbal ones, suggesting that the defective gene causes conceptual problems as well as ones of muscular control.

The human genome is constantly accumulating DNA changes through random mutation, though they seldom affect the actual structure of genes. When a new gene sweeps through the population, the genome's background diversity at that point is much reduced for a time, since everyone possesses the same stretch of DNA that came with the new gene. By measuring this reduced diversity and other features of a must-have gene, Dr. Paabo has estimated the age of the human version of FOXP2 as being less than 120,000 years.

Dr. Paabo says this date fits with the theory advanced by Dr. Klein to account for the sudden

appearance of novel behaviors 50,000 years ago, including art, ornamentation and ling distance trade. Human remains from this period are physically indistinguishable from those of 100,000 years ago, leading Dr. Klein to propose that some genetically based conginitve change must have prompted the new behaviors. The only sufficient magnitude, in his view, is acquisition of language.

ARTICLE VI:

[1] All Debts cotnracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

(2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV:

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XI

The Judicial power of the United States shall not be considered to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

ARTICLE IV:

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Prvileges and Immunities of Citizens in the several States.

42 U.S.C. ¶ 12102. **Definitions**.

As used in this chapter: ……..

(2) Disability

The term "'disability"' means, with respect to an individual—

[A] a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

[B] a record of such an impairment; or

[C] being regarded as having such impairment

42 U.S.C. ¶ 12131. **Definitions**

As used in this subchapter;

(1) Public Entity

The term "public entity" means----

(A) any State or local government

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services of the participation in programs or activities provided by the public entity.

Appendix D

42 U.S.C. ¶ 12132 Discrimination

Subject to the provision of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. ¶ 12133 Enforcement

The remedies, proceedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disabilty in violation of section 12132 of this title.

California Business and Professions Code ¶ 6049.1. **Certified Copy of final order determining professional misconduct; evidence; expedited disciplinary proceeding; issues; discovery; proceedings in other jurisdictions**

(a) In any disciplinary proceeding under this chapter, a certified copy of a final order made by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States or of any state or territory of the United States or of the District of Columbia, determining that a member of the State Bar committed professional misconduct in such other jurisdiction shall be conclusive evidence that the member is culpable of professional misconduct in this state, subject only to the exceptions set

forth in subdivision (b).

(b) The board may provide by rule for procedures for the conduct of an expedited disciplinary proceeding against a member of the State Bar upon receipt by the State Bar of a certified copy of a final order determining that the member has been found culpable of professional misconduct in a proceeding in another jurisdiction conducted as specified in subdivision (a). The issues in the expedited proceeding shall be limited to the following:

1. The degree of discipline to impose

2. Whether as a matter of law, the member's culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in the State of California under the laws or rules binding upon members of the State Bar at the time the member committed misconduct in such other jurisdiction, as determined by the proceedings specified in subdivision (a).

3. Whether the proceedings of the other jurisdiction lacked fundamental constitutional protection.

The member of the State Bar subject to the proceedings under this section shall bear the burden of establishing that the issues in paragraph (2) and (3) do not warrant the imposition of discipline in this state.

(c) In proceedings conducted under subdivision (b), the parties need not be afforded an opportunity for discovery unless the State Bar department or panel having jurisdiction so orders upon a showing of good cause.

(d) In any proceeding conducted under this chapter, a duly certified copy of any portion of the record of disciplinary proceedings of another jurisdiction conducted as specified in subdivision (a) may be received in evidence.

(e) This section shall not prohibit the institution of proceedings under Section 6044, 6101, or 6102, as may be appropriate, concerning any member of the State Bar based upon the member's conduct in another jurisidiction, whether or not licensed as an attorney in the other jurisdiction.

Rules of Procedure of the State Bar of California:

DIVISION VII. REVIEW BY REVIEW DEPARTMENT AND POWER DELEGATED BY SUPREME COURT.

Rule 300. PETITION FOR INTERLOCUTORY REVIEW AND FOR REVIEW OF SPECIFIED MATTERS.

(L): Decision: In those proceedings in which review has been granted, the Review Department may deny relief sought in the petition, or may grant the relief in whole or in part. If the requested relief is granted in whole or in part, it may be granted subject to appropriate conditions imposed upon the petitioning party. If a quorum of the Review Department is not available to rule on the petition in time to provide the petitioning party with meaningful relief, the Presiding Judge may act for the Review Department on any petition under this rule, subject to reconsideration by the Review Department in bank on its own motion or on motion of any party.

Supreme Court, U.S.
FILED
SEP 22 2005
OFFICE OF THE CLERK

No. 05-28

In The

Supreme Court of the United States

RICHARD STEVENS,

Petitioner,

v.

STATE BAR OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

SUPPLEMENTAL BRIEF

RICHARD STEVENS
Petitioner pro se
221 West 82nd Street
New York, New York 10024
(212) 724-7721
(714) 330-9960

September 22, 2005

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United States v *Georgia, cert. granted*, May 16, 2005, 125 S. Ct. 2256.....1

Other Authorities

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dated July 5, 2005 .....a

Correctiosn by petitioner received September 1, 2005. .....b

The instant petition for certiorari was timely filed on June 29th and docketed on July 5th. [see *App.* A; # 05-28]. It is pending. A correction was received by the Court on September 1, 2005. [see *App.* at (b)] Respondents waiver was received by petitioner on July 15, 2005. [see Rule ¶ 15.2].

Petitioner had raised *Goodman* v *Georgia* and *United States* v *Georgia*. [# 04-1203; 125 S. Ct 2256 (2005); 04-1236; 125 S. Ct. 2266 – see Point VII of petition at bar at page 29] The briefs were filed on behalf of petitioner Goodman on July 29, 2005. Respondents brief was filed September 22, 2005.

SUPPLEMENTAL POINTS IN SUPPORT OF PETITION

POINT I

Both *Goodman* and present petition raise similar yet distinguishable arguments as they relate to *Lane*. *Goodman* is a subsequent development that was not available before the filing of the present petition. [Rule ¶ 15.8]

The import of the landmark *Lane* case rendered on May 17, 2004, to the instant petition, is that it is directly related to State Courthouses. On the other hand, the facts in *Goodman* do not appear to embrace any denial of access to the Court. But the question presented by *Goodman* is "to what extent" does Title II abrogate the States Eleventh Amendment immunity ? [see Petition filed March 9, 2005]

It is the present petitioner's point that there is a fine line to consider. Is abrogation under Title II applicable for a prisoner's right to proceed in the judiciary ? [i.e. legal library; access to Attorney; Right to proceed to Court] As petitioner's argument is that the heart of *Lane* concerned itself with the judiciary he cannot conclusively side with Goodman's position. [See Point I-V of # 05-28]

Conversely, the underlying decision rendered by the Eleventh Circuit in *Goodman* did find a cause of action against the named state officials for injunctive relief. [see *Goodman* v *O.T. Ray,* 120 Fed. App. 785, unpublished slip opinion filed September 16, 2004, attached to Solicitor General's petition for certiorari filed March 9, 2005 at *App. A pages 20a & 22a*] This is consistent with petitioner's point that Title II is the Supreme law of the land and binds all state officials to adhere to Title II on a prospective basis. [see Point VI [A] & [B] pages 27-28 of petitioner's brief docketed July 5, 2005]

Petitioner cannot file any brief in harmony with either side in the *Goodman* matter. [cf. & see Supreme Court Practice, Stern, Gressman, Shapiro & Geller, *Eighth Edition* 2002, at ¶ 6.22 pages 399-400] Nor can there be any allotted time for any potential oral argument as is normally the case for matters that are consolidated. [*id.* ¶ 14.6 at page 683] Although petitioner cannot himself raise consolidation, Rule ¶ 27 (3) does make clear that if cases are "related", the Court may consolidate the matters "on such other terms as the Court may prescribe."

An alternative to formal consolidation that appears to be proper is to hold the instant petition pending the final decision in *Goodman*. [Supreme Court Practice, *id.*, at 682] Another, is to summarily reverse the judgment below based upon one question raised by petitioner.[Supreme Court

Practice, *id.*, "*Limited Grant of certiorari*," ¶ 5.10 at page 312 ft. note 74, citing i.e. *California* v *Mitchell Bros' Santa Ana Theatre*, 454 U.S. 90, 92 (1981) – Also see Supreme Court Practice, *Seventh Edition*, (1993) ¶ 5.12 at page 249, citing *Eckerd Drug, Inc.* v *Brown*, 457 U.S. 1128 (1982); *Lane* v *Smith*, 457 U.S. 1102 (1982)]

The issues raised in the present petition under question # 3 raises new evidence that was impossible to bring up before August 2004. It is directly connected to petitioner's neurological impairment that falls under Title II of the ADA. Therefore, the waiver by the State Bar in the present matter to file opposition papers to the instant petition is an effective admission to these facts. It is "nonjurisdictional." [see Supreme Court Practice, *Eighth Ed.* (2002) ¶ 6.37 quoting, Rule ¶ 15.2 and citing *Oklahoma City* v *Tuttle*, 471 U.S. 808, 815-816 (1985); also see *id.* at ¶ 6.37 at page 455, Ft. note 152 citing *Knowles* v *Iowa*, 525 U.S. 113, 116 n. 2 (1998)].

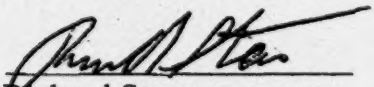
Lastly, to prevent unnecessary repetition, GVR orders of reversal after one final judgment preceded the other has been recognized. [see Supreme Court Practice, *Eighth Ed.* (2002) ¶ 5.12 at page 319 citing *Henry* v *City of Rock Hill*, 376 U.S. 776, 777 (1964), citing *Henry* v City of Rock *Hill*, 375 U.S. 6 (1963) – also see *Adarand Costructors, Inc.*, v *Pena*, 515 U.S. 200, 222-223 (1995)]

Conclusion

Petitioner respectfully prays that this Court grant this Petition and

1. Issue a writ of certiorari and/or
2. Hold the instant petition for summary disposition in light of Lane and Goodman and/or
3. Summarily reverse the order below in light of legally new evidence and *Lane* and/or
4. That petitioner have such additional relief and process as may be necessary and appropriate.

Respectfully submitted,



Dated: September 22, 2005

Richard Stevens *pro se*
221 West 82nd Street
New York, NY 10024
(212) 724-7721
(714) 330-9960p

S.R.@

Appendix A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 5, 2005

Mr. Richard Stevens
221 West 82nd Street
New York, NY 10024

Re: Richard Stevens
v. State Bar of California
No. 05-28

Dear Mr. Stevens:

The petition for a writ of certiorari in the above entitled case was filed on June 29, 2005 and placed on the docket July 5, 2005 as No. 05-28.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter, Clerk

by /s/ Sandy Spagnolo
Sandy Spagnolo
Case Analyst

Enclosures

Appendix B

Richard Stevens
221 West 82nd Street
New York NY 10024
(212) 724-7721 Fax: (212) 362-4383

August 27, 2005

By Federal Express:
August 29, 2005
United States Supreme Court
One First Street N.E.
Washington D.C. 20543

RECEIVED :
SEPTEMBER 1, 2005
OFFICE OF THE
CLERK SUPREME
COURT, U.S.

Honorable Court: Re: *Richard Stevens* v *State Bar of California* Docket # 05-28: Correction of *Error: No prejudice.*

The petition was filed on June 29th and docketed on July 5th 2005. It is pending. Respondent waived the right to file any opposition.

Question # 2 of the petition is set forth as follows:

Does the abrogation of the State's Eleventh Amendment immunity coupled with Title II being the law of the land as of May 17, 2004, override collateral estoppel of a sister state proceeding when the former tribunal unequivocally deprived petitioner of his opportunity to be heard ?

In reviewing the petition today the undersigned respectfully apologizes for the two consecutive paragraphs set forth on pages 27-28.

1. The *Seminole and Fitzpatrick* citations should follow the last paragraph set forth on page 27.

2. "As this Court previously set forth" which is set forth immediately thereafter on page 28 should be deleted. That is petitioner's contention, not what the Court set forth.

The State Bar is not prejudiced by this correction. Petitioner respectfully stands by all legal and factual points set forth in the petition and apologizes for the error.

Respectfully,

_____

Richard Stevens

cc: State Bar:
Mr. Zanassi Esq.